No. 990

Office Supreme Court, U.S.
FILED
MAY 9 1958
JOHN T. FEY, Clerk

No. 25,

May Term, 1958.

IN THE

Supreme Court of Pennsylvania

MIDDLE DISTRICT.

COMMONWEALTH OF PENNSYLVANIA

vs.

NATIONAL BISCUIT COMPANY,

Appellant.

RECORD.

Appeal From Final Judgment of the Court of Common Pleas of Dauphin County at No. 59 Commonwealth Docket, 1954.

ROY J. KEEFER,
HULL, LEIBY & METZGER,
208 Walnut Street,
Harrisburg, Pennsylvania,

LESLIE M. SWOPE,
DRINKER BIDDLE & REATH,
1100 Philadelphia National Bank Bldg.,
Philadelphia 7, Pennsylvania,
Counsel for Appellant.

INDEX TO RECORD.

	Page
I. Relevant Docket Entries	1a
II. Appeal and Specification of Objections	3a
Exhibit "A"—Franchise Tax Settlement	13a
Exhibit "B"—Refusal of Petition for Resettlement	15a
Exhibit "C"—Refusal of Petition for Review	15a
III. Evidence—Transcript of Proceedings	16a
Discussion	16a
John D. Rively—Direct Examination	18a
Discussion	21a
Commonwealth's Exhibit No. 1—1952 Franchise Tax Report and Franchise Tax Settlement Thereon	25a
Commonwealth's Exhibit No. 2—Petition for Resettlement	25a
Exhibit A—Franchise Tax Settlement	37a
Commonwealth's Exhibit No. 3—Order Refusing Petition for Resettlement	38a
Commonwealth's Exhibit No. 4—Petition for Review	39a
Exhibit A—Order Refusing Petition for Resettlement	42a
Commonwealth's Exhibit No. 5—Order Refusing Petition for Review	43a
Commonwealth's Exhibit No. 6—Transcript of Ledger Account	44a
Commonwealth's Exhibit No. 7—Stipulation of Facts	45a
Exhibit A—1952 Franchise Tax Settlement	54a
Exhibit B—Order Refusing Petition for Resettlement	54a
Exhibit C—Order Refusing Petition for Review	54a
Commonwealth's Exhibit No. 8—Agreement to Try Without Jury	55a
Amendments to Stipulation of Facts	56a
Order Re Amendments	58a

INDEX TO RECORD (Continued).

	Page
Defendant's Exhibit No. 1—Relevant Portions of Record and Briefs in Case of National Biscuit Company v. Philadelphia, 374 Pa. 604	59a
Complaint in Equity	59a
Defendant's Answer	67a
Philadelphia Ordinance Approved by Mayor December 9, 1952	68a
Relevant Part of Sterling Act	79a
Relevant Excerpts From Appellee's Brief in Supreme Court of Pennsylvania (374 Pa. 604)	80a
Appellee's Petition for Reargument	96a
Defendant's Exhibit No. 2—Appeal and Specification of Objections, Printed as Item II, supra	108a
Defendant's Exhibit No. 3—Bond on Appeal From Settlement of an Account by the Secretary of Revenue and the Auditor General Filed May 18, 1954 (Not Printed)	108a
IV. Relevant Excerpts From Taxing Statute	109a
V. Commonwealth's Requests for Findings of Fact and Conclusions of Law	113a
VI. Defendant's Requests for Findings of Fact	116a
VII. Defendant's Requests for Conclusions of Law	128a
VIII. Opinion Filed With Judgment Nisi	133a
IX. Judgment Nisi	140a
X. Defendant's Exceptions	141a
XI. Opinion on Exceptions	156a
XII. Final Judgment	157a
XIII. Statement Served on Lower Court Under Rule 43	158a
XIV. Stipulation Concerning the Record	160a

Record.

I.

RELEVANT DOCKET ENTRIES.

Appeal from decision of Board of Finance & Revenue, Franchise Tax for 1952.

Apr. 14, 1954. Appeal & objections filed.

May 18, 1954. Approved bond filed.

Oct. 11, 1955. Stipulation of facts filed.

Oct. 11, 1955. Agreement to try without a jury filed.

Nov. 2, 1955. Record of hearing of Oct. 11, 1955 lodged.

Nov. 18, 1955. Record of hearing of Oct. 11, 1955 filed.

Jan'y 25, 1956. Amendments to stipulation of facts filed.

Jan'y 25, 1956. Briefs of Comth & Appellant filed. Case argued before Court en banc. Deft's requests for Findings of Fact & Conclusions of law filed.

Febry 9, 1956. Deft's Reply Brief filed.

Feby 15, 1956. Record to Court.

Feby 24, 1956. Comth's requests for Findings of Fact & Conclusions of law filed.

Feby 24, 1956. Comth's reply brief filed.

April 12, 1956. Appeal is dismissed and judgment entered in favor of Commonwealth and against Deft for $58,321.60 and marked satisfied unless exceptions be filed within 30 days, see opinion and order filed.

April 27, 1956. Deft's Exceptions filed s/a.

Oct. 3, 1956. Deft's brief filed.

Oct. 11, 1956. Plffs brief filed. Case argued before Court en banc. Record to Court.

Nov. 9, 1956. Judgment entered in accordance with decree nisi, see opinion & final Order filed.

Nov. 29, 1956. Certiorari sur appeal from Supreme Court to No. 25 May T. 1957, filed.

Nov. 29, 1956. Notice of appeal & acceptance of service by Court below filed, also by Appellee.

II.

APPEAL AND SPECIFICATION OF OBJECTIONS.

National Biscuit Company, hereinafter referred to as appellant, hereby appeals from the settlement of Franchise Tax made against it for the year 1952 and from the refusal of its Petition for Review of said settlement by the Board of Finance and Revenue and in support of its appeal avers:

1. Appellant was incorporated under the laws of the State of New Jersey on February 3, 1898. It registered and qualified to do business in Pennsylvania on March 28, 1899, and re-registered on August 21, 1933, under the Business Corporation Law of 1933 to engage in Pennsylvania in the business of "manufacture and sale of bakery products".

2. Appellant's principal address is 449 West Fourteenth Street, New York, N. Y.; and its registered address in Pennsylvania is Fidelity-Philadelphia Trust Building, 123 South Broad Street, Philadelphia, Pennsylvania, c/o C. T. Corporation System.

3. The tax involved is the so-called "Franchise Tax" imposed under the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420 as amended by the Act of May 16, 1935, P. L. 184 and by further amendatory Acts; 72 Purdon's Statutes 1871, 1901. The said Act of 1889 and amendatory Acts will sometimes be referred to herein as the Act of May 16, 1935, P. L. 184, as amended.

4. During the year 1952, appellant was engaged within and without Pennsylvania in the manufacture and sale of bakery products; and, also, it was engaged exclusively outside of Pennsylvania in the ownership, control and supervision of its intangible assets which

included, inter alia, investments in United States securities and shares of stock of subsidiary companies operating in foreign countries. The business of the subsidiary companies was independent of and unrelated to the business conducted by appellant in the United States, including Pennsylvania.

5. Using a report blank furnished to it by the Department of Revenue, appellant duly filed with that department its "Franchise Tax" report for 1952, which is incorporated herein by reference. As indicated in this report, appellant had 365 places of business, 21 in Pennsylvania and 344 outside of Pennsylvania; its President and Treasurer were located and performed their duties at 449 West Fourteenth Street, New York, New York; no Assistant Treasurer or Assistant Secretary resided or performed his duties in Pennsylvania; the annual meeting of its stockholders was held at 1 Exchange Place, Jersey City, New Jersey; and its directors met, its principal bank account was maintained and its bonds, securities, etc., were kept, in New York City.

6. Also, as indicated in part in said Report, the assets of the appellant included, inter alia, the following at December 31, 1952:

Investment in United States securities	$26,300,000.00
Investment in shares of subsidiary companies operating in foreign countries	8,823,465.17
Investment in tangible property in Pennsylvania	6,333,877.00

7. On the basis of said Report and pursuant to the purported provisions of the Act of May 16, 1935, P. L. 184, as amended, the Department of Revenue, on October 28, 1953, settled, and, on November 5, 1953, the Department of the Auditor General approved settle-

ment of a so-called "Franchise Tax" against appellant for the year 1952. Said Settlement was made upon the theory that the tax is an Excise Tax and not a Property Tax. A true and correct copy of said Settlement, mailed to appellant on November 16, 1953, is attached hereto, made a part hereof, and marked Exhibit "A".

8. In the said "Franchise Tax" settlement, the taxable valuation to which the tax rate is applied is determined to be $11,664,320. On a property tax basis, to wit, the ratio of tangible property in Pennsylvania to total assets times the Capital Stock valuation of $160,000,000

$$\left(\frac{6,333,877}{194,941,349} \times 160,000,000 = 5,198,591\right),$$

the taxable valuation is $5,198,591. The excess of the taxable valuation on the "Franchise Tax" basis over the taxable valuation on the property tax basis, or $6,465,729, represents the taxable value attributable to appellant's tangible and intangible assets which had their situs, domiciliary, business or commercial, outside of Pennsylvania, including large investments in United States securities and shares of subsidiary companies operating in foreign countries, as listed heretofore.

9. On June 26, 1953, the Supreme Court of Pennsylvania, in the case of *National Biscuit Company v. Philadelphia,* 374 Pa. 604, held that the so-called Pennsylvania "Franchise Tax" is a property tax and not an excise tax. That case arose upon a Bill in Equity filed by appellant and is the last expression of opinion by said Court as to the nature of the tax in its application to appellant. For purposes of this appeal, it must be accepted as expounding the controlling judicial interpretation of appellant's rights and liabilities. This is particularly true since the prior decisions of the

Supreme Court of Pennsylvania were inconsistent in expounding the nature of the same tax as follows (list of cases is not exclusive):

Year of Decision	*Case.*	*Nature of Tax*
1939	*Com. v. Columbia Gas & Electric Corporation,* 336 Pa. 209	Excise Tax
1944	Com. v. Ford Motor Company, 350 Pa. 236	Excise Tax
1944	Com. v. Quaker Oats Company, 350 Pa. 253	Excise Tax
1945	Com. v. Monessen Amusement Company, 352 Pa. 120	Excise Tax
1948	Federal Drug Co. v. Pittsburgh, 358 Pa. 454	Property Tax
1950	Murray v. Philadelphia, 364 Pa. 157	Property Tax
	to which list there is now added, as above described:	
1953	*National Biscuit Company v. Phila. supra*	Property Tax

10. On January 26, 1954, appellant filed with the Department of Revenue its Petition for Resettlement of the "Franchise Tax" settled against it for the year 1952. In that Petition appellant contended that the settlement should have been made on a property tax basis in accordance with the decision of the Supreme Court of Pennsylvania in the *National Biscuit Case,* and set forth all of the questions raised and objections specified herein.

11. On February 11, 1954, the Department of Revenue and Auditor General refused the prayer of said petition for resettlement. A true and correct copy of the notice of refusal, mailed to appellant under

date of February 17, 1954, is attached hereto, made a part hereof, and marked Exhibit "B".

12. On March 11, 1954, appellant filed with the Board of Finance and Revenue its Petition for Review of the action of the Departments of Revenue and Auditor General in refusing its petition for resettlement. In that Petition for Review, appellant repeated its contention that the settlement should have been made on a property tax basis in accordance with the decision of the Supreme Court of Pennsylvania in the *National Biscuit Case,* and set forth all the questions raised and objections specified herein.

13. On March 17, 1954, the Board of Finance and Revenue refused the prayer of its Petition for Review. A true and correct copy of the notice of refusal is attached hereto, made a part hereof, and marked Exhibit "C".

14. In accordance with the provisions of the Acts of Assembly in such case made and provided the appellant, National Biscuit Company, being aggrieved by the settlement and by the decision of the Board of Finance and Revenue, prosecutes this appeal therefrom and files herewith the following:

SPECIFICATION OF OBJECTIONS:

(1) The tax settlement against appellant for 1952, having been made upon the theory that the tax is an excise tax and not a property tax, is contrary to the decision of the Supreme Court of Pennsylvania in *National Biscuit Company v. Philadelphia,* 374 Pennsylvania 604 (1953), and other decisions of that Court holding the tax to be a property tax.

(2) The tax imposed under the provisions of the Act of May 16, 1935, P. L. 184, as amended, having

been held to be a property tax as aforesaid, the so-called "Franchise Tax" settlement made against your appellant for 1952 pursuant thereto and the refusal of its Petition for Review by the Board of Finance and Revenue violate:

(a) Article VI, Clause 2, and Article I, Section 8, Clause 2 of the Constitution of the United States in that the tax is imposed in part upon appellant's investment in United States securities.

(b) Section 3701 of the Revised Statutes of the United States, 31 U. S. C. Section 742, which generally exempts interest-bearing obligations of the United States from State and local taxation.

(c) The due process and property clauses, Sections 1, 9 and 10 of Article I of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that tax is imposed upon tangible and intangible assets of appellant which have their situs outside of Pennsylvania, and which therefore are beyond the taxing power and jurisdiction of Pennsylvania.

(d) The uniformity clause of Section 1 of Article IX of the Constitution of Pennsylvania and the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions, particularly of U. S. securities and tangible property located outside of Pennsylvania, granted to domestic corporations, are denied to your appellant, a foreign corporation.

(3) Under the Constitutions both of the United States and of Pennsylvania, appellant has the right to be heard in the courts and to have its tax liability determined according to law and justice. If, in the proceedings instituted by this appeal, the so-called

"Franchise Tax" settlement made against appellant for the year 1952 should be upheld by the courts of the Commonwealth of Pennsylvania, such decision would be inconsistent with the above mentioned prior decision rendered against appellant in the *National Biscuit Case supra*, would subject appellant to simultaneous double taxation under two mutually exclusive taxing statutes, and would be arbitrary and unreasonable. Inasmuch as the several decisons of the Supreme Court of Pennsylvania have been based upon inconsistent theories as to the nature of the tax; if the decision of the Supreme Court in the *National Biscuit Case supra* should not be followed in this proceeding, representing another reversal of theory as to the nature of the tax, appellant avers that it will have been denied a fair trial in the courts and a reasonable adjudication of its rights. In such event and under such circumstances, the Pennsylvania and Federal Constitutions would be violated as follows:

(a) The due process clauses of Sections 1, 9 and 10 of Article I of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States; in that such decision would be inconsistent with the above mentioned prior decison rendered against appellant, would subject appellant to two mutually exclusive taxing statutes, would be arbitrary and unreasonable, and would deny appellant a fair trial in the courts and a reasonable adjudication of its rights.

(b) The uniformity clause of Section 1 of Article IX of the Constitution of Pennsylvania and the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions granted to domestic corporations would be denied to your appellant, a

foreign corporation, on the basis of semantics and of distinctions having no substance or reality.

(c) Section 1 of Article III of the Constitution of the Commonwealth of Pennsylvania, in that such inconsistent decisions would usurp the legislative power and would constitute legislation by the Pennsylvania courts.

(d) Section 3 of Article III of the Constitution of the Commonwealth of Pennsylvania, in that the subject of the Act, as construed inconsistently by the courts from time to time, is not expressed clearly in its title.

(e) Sections 11 and 12 of Article I of the Constitution of Pennsylvania, in that appellant would be denied its day in court, a remedy by due course of law, and right and justice administered to it without sale, denial or delay; and the power of suspending laws would be exercised by the courts without authority of the legislature.

(f) Section 2, Clause 1 of Article IV of the Constitution of the United States, in that appellant, a foreign corporation, would be denied privileges and immunities of citizens of Pennsylvania.

(g) Clause 2 of Article VI of the Constitution of the United States, in that the judges in Pennsylvania upholding the settlement would be acting inconsistently with the constitutional mandate that the constitution and laws of the United States shall be the supreme law of the land and the judges in every state shall be bound thereby.

(4) The Board of Finance and Revenue erred in making the following decision:

"This Petition for Review is refused and the action taken by the Department of Revenue, approved

by the Department of the Auditor General, is hereby sustained".

(5) The Board of Finance and Revenue erred in refusing to resettle the tax in an amount not exceeding $25,992.95.

(6) General relief.

WHEREFORE, appellant prays that this Honorable Court shall hear its Appeal and that the proper adjustment, order or decree be entered in favor of appellant correcting said settlement of "Franchise Tax" against Appellant for the year 1952 by eliminating therefrom any tax or portion thereof imposed upon or with respect to appellant's investments in United States securities and its tangible assets and/or its other assets having a situs outside of Pennsylvania, or for such other relief as may be proper under the circumstances of this case; and that a credit be allowed for the overpayment of "Franchise Tax" by appellant.

And it will ever pray, etc.

NATIONAL BISCUIT COMPANY,

By /s/ G. A. MITCHELL,
Vice-President.

(Corporate Seal)

Attest:

/s/ A. T. BULLOCK, *Secretary.*

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

G. A. MITCHELL, being duly sworn according to law, deposes and says that he is Vice-President of NATIONAL BISCUIT COMPANY, the appellant in the foregoing Appeal to the Court of Common Pleas of Dauphin County from the settlement of "Franchise Tax" made against it for the year 1952, and from the refusal of its Petition for Review by the Board of Finance and Revenue; that this Appeal is not taken for delay, but because appellant believes injustice has been done by the settlement of the account and the decision of the Board of Finance and Revenue appealed from; and that the facts set forth in the said Appeal and in the accompanying Specifications of Objections, incorporated herein, and in the exhibits attached thereto, are true to the best of his knowledge and belief.

/s/ G. A. MITCHELL

Sworn to and subscribed before me this 12th day of April, 1954.

/s/ WILLIAM H. PETERSON
Notary Public, State of New York
No. 31-8344000
Qualified in New York County
My Commission Expires: March 30-1956

(Seal)

ROY J. KEEFER,
HULL, LEIBY AND METZGER,
208 Walnut Street,
Harrisburg, Pennsylvania.
LESLIE M. SWOPE,
CHARLES J. BIDDLE,
DRINKER, BIDDLE & REATH,
117 South 17th Street,
Philadelphia 3, Pennsylvania,
Attorneys for National Biscuit Company.

Exhibit "A".

FRANCHISE TAX SETTLEMENT

(Certified Copy)

Commonwealth of Pennsylvania

Department of Revenue

Harrisburg, Penna.

Date Mailed. Nov. 16, 1953

Box No. 2295-07

Invoice No. .....

Return this sheet with remittance drawn to the order of Commonwealth of Pennsylvania.

Checks are received subject to final payment and at the risk of the taxpayer.

(20)

Note: Balance due on this account bears interest at 6% from the due dates to date of payment, as provided in section 806 of the fiscal code, as amended 1945.

National Biscuit Company

c/o Hull, Leiby & Metzger
Harrisburg, Pennsylvania

In account with the Commonwealth of Pennsylvania

SETTLEMENT—FRANCHISE TAX

For Twelve Months Ending 12/31/52

Value of Capital Stock as Appraised by Department of Revenue $160 000 000

$ 6 670 235
———————— = .050988 $
$130 818 469

$ 10 531 322
———————— = .097687
$107 806 607

$ 25 527 941
———————— = .070032 .072902
$364 516 055 3).218707

Taxable Value .....$ 11,664,320

Tax at Five Mills	$58,321.60
Penalty (For failure to file reports within time limit prescribed by law)	
Total	$58,321.60
Do not include interest. Interest statement will follow payment of tax balance	
Amount Paid	58,308.88
Balance due Commonwealth .	$ 12.72

(Seal)

DEPARTMENT OF REVENUE

Harrisburg, Pa., 10-28-53

settled and delivered to auditor general:

S. C. AUDELEWICZ,
Secretary of Revenue

For OTTO F. MESSNER

DEPARTMENT OF THE AUDITOR GENERAL

Harrisburg, Pa., 11-5-53

audited and approved:

JOHN L. BRINTON
For CHAS. R. BARBER
Auditor General

Exhibit "B"—Refusal of Petition for Resettlement.

Printed as Commonwealth's Exhibit No. 3 at Page 38a, infra.

Exhibit "C"—Refusal of Petition for Review.

Printed as Commonwealth's Exhibit No. 5 at Page 43a, infra.

III.

EVIDENCE—TRANSCRIPT OF PROCEEDINGS.

Before: Honorable WILLIAM H. NEELY, *Judge*, Honorable WALTER R. SOHN, *Judge*, Honorable HOMER L. KREIDER *Judge*, and Honorable KARL E. RICHARDS, *Judge*, 12th Judicial District of Pennsylvania, Courts of Dauphin County.

At Harrisburg, Pennsylvania, Tuesday, October 11, 1955, beginning at 11:00 o'clock a. m., E. D. S. T., in Court Room No. 1, Dauphin County Court House.

Appearances:

For the Commonwealth: GEORGE W. KEITEL, ESQ., Deputy Attorney General.

For the Defendant: HULL, LEIBY & METZGER, by ROY J. KEEFER, ESQ; DRINKER, BIDDLE & REATH, by LESLIE M. SWOPE, ESQ.

Mr. Keitel: Commonwealth versus National Biscuit Company. This case involves a 1952 franchise tax with the National Biscuit Company, and to put the issue broadly, raises a question of whether this is a property tax or an excise tax. I won't attempt to argue the various issues involved here, but merely state that is essentially the general question involved developed by counsel.

Mr. Keefer: May it please the Court, Charles J. Biddle and Leslie M. Swope of the Philadelphia law firm of Drinker, Biddle and Reath are associated with my firm as counsel for the defendant in this case. Mr. Swope is present here this morning. I don't think he needs any introduction to the Court.

The Court: (Judge Neely): Very happy to have you with us.

Mr. Keefer: I wanted to make a supplemental statement as to the issues involved in the case, if I may, because I am going to come along later and we may have the same problem that you have in the Circular Realty case where you had incorporation by reference.

This case arises in this way. The Sterling Act of 1932 authorized the City of Philadelphia to levy taxes. It contained provisions prohibiting the City of Philadelphia from duplicating any State tax or license fee. Under an ordinance of December of 1952 Philadelphia levied a mercantile license tax measured by the annual volume of business, or at the option of the business by annual volume of business less labor and material costs.

National Biscuit Company, the present defendant in this proceeding, and other taxpayers, protested the Philadelphia tax on the ground that the Philadelphia tax, being a tax on the privilege of engaging in business, duplicated the State Franchise and Corporate Net Income Taxes.

The Court (Judge Neely): Was that tax levied under the tax anything act?

Mr. Keefer: No, the Sterling Tax Act of 1932 was the forerunner of the tax anything act in 1947. In every court decision involving the State Franchise and Corporate Net Income Taxes directly, the courts have held that those taxes were privilege taxes. Therefore, the National Biscuit Company and other taxpayers in the Philadelphia case contended that the Philadelphia tax duplicated the State tax.

The Supreme Court of Pennsylvania, a majority, upheld the Philadelphia tax on the ground that the Philadelphia tax levied an excise tax on a privilege of doing business, whereas the State taxes were property taxes.

Now, National Biscuit Company, the present defendant in this proceeding, contends that if the Franchise Tax is a Property Tax, Property Tax principles ought to be applied. Accordingly and of necessity, one of the main issues is as to the nature of the tax. And if it is a Property Tax, then constitutional questions arise as to the taxation of United States securities and assets beyond the jurisdiction of Pennsylvania.

Would you want to add anything, Mr. Swope?

Mr. Swope: No.

JOHN D. RIVELY: Called as a witness on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Keitel:

Q. Mr. Rively, state your position with the Department of Revenue?

A. Principal Tax Examiner, Bureau of Corporation Taxes.

Q. As such are you familiar with the tax files of the Department of Revenue?

A. Yes, sir.

(Commonwealth's Exhibit No. 1, being franchise tax report for year 1952, was produced and marked for identification.)

Q. I refer you to Commonwealth's Exhibit No. 1 and ask you to identify that?

A. This is the 1952 franchise tax report as filed by the National Biscuit Company.

Q. Does that report contain a settlement of the tax?

A. Yes, sir.

Q. What is the date and amount of that settlement?

A. The report was settled on November 5th, 1953. It shows a settlement in the amount of $58,321.60.

(Commonwealth's Exhibit No. 2, being petition for resettlement, was produced and marked for identification.)

Q. I refer you now to Commonwealth's Exhibit No. 2 and ask you to identify that?

A. This is a petition for resettlement of the franchise tax imposed against the National Biscuit Company for the calendar year 1952.

(Commonwealth's Exhibit No. 3, being order refusing resettlement, was produced and marked for identification.)

Q. I refer you now to Commonwealth's Exhibit No. 3 and ask that you identify that?

A. This is a decision made by the Resettlement Board of the Department of Revenue stating that the petition for resettlement has been refused.

(Commonwealth's Exhibit No. 4, being petition for review, was produced and marked for identification.)

Q. Referring now to Commonwealth's Exhibit No. 4, will you identify that?

A. This is a petition for review of franchise tax imposed against the National Biscuit Company for the calendar year 1952 as filed with the Board of Finance and Revenue of the Department of Revenue.

(Commonwealth's Exhibit No. 5, being order refusing petition for review, was produced and marked for identification.)

Q. Referring now to Commonwealth's Exhibit No. 5, will you identify that?

A. This is a decision reached by the Board of Finance and Revenue stating that the petition for review as filed by the National Biscuit Company for the franchise tax imposed for the calendar year 1952 has been refused and the decision of the Department of Revenue and the Auditor General is confirmed.

(Commonwealth's Exhibit No. 6, being transcript of the ledger account, was produced and marked for identification.)

Q. Mr. Rively, I refer you to Commonwealth's Exhibit No. 6 and ask that you identify that?

A. This is a transcript of the ledger record in the Department of Revenue showing that the franchise tax for the National Biscuit Company for the year 1953 has been paid in full.

Mr. Keitel: May it please the Court, we offer into evidence Commonwealth's Exhibits 1 to 6 inclusive.

The Court (Judge Neely): Any objection?

Mr. Keefer: No objection.

The Court (Judge Neely): They may be admitted.

(Commonwealth's Exhibit No. 7, being Stipulation of Facts and Commonwealth's Exhibit No. 8, being agreement to try without jury, were produced and marked for identification.)

Mr. Keitel: The Commonwealth would also like to offer into evidence Stipulation of Facts which has been agreed to by counsel for the respective parties; and also stipulation for the trial of this case without a jury.

The Court (Judge Neely): No objection?

(No audible response.)

The Court (Judge Neely): Admitted.

Mr. Keitel: The Commonwealth rests.

The Court (Judge Neely): The defendant?

Mr. Keefer: May it please the Court, I would just like to state that the Stipulation of Fact has been offered in evidence on behalf of the defendant also.

I have no questions to ask the witness.

In Paragraph 19 of the Stipulation, the parties have agreed that the entire record in the Philadelphia Mercantile License Tax case shall be incorporated in this proceeding by reference as evidence of the facts and issues involved in that case.

The Court (Judge Neely): The record in the Supreme Court?

Mr. Keefer: Yes. The record and the briefs of the parties and the Philadelphia Ordinance. We didn't want to put these in the record because if and when the case goes up on appeal we didn't want to have to print these and be a part of the record costs. But I wanted to offer them now for the convenience of the Court merely. These documents consist of the record, the supplemental record, the Philadelphia Ordinance, and the briefs of both parties.

If it will help the Court, we will offer them into the record.

(Whereupon, discussion off the record.)

The Court (Judge Neely): The defendant is offering this record, we understand?

Mr. Keefer: That's right.

The Court (Judge Neely): Will you have it identified as an exhibit?

Mr. Swope: We will have to identify each of these papers.

The Court (Judge Neely): Can you have the whole record identified as an exhibit?

Mr. Keefer: As just one exhibit?

The Court (Judge Neely): As one exhibit. The record you are offering, can't it be identified as an exhibit?

Mr. Swope: That is all right.

The Court (Judge Neely): It can all be put in a big envelope and kept as an exhibit.

Mr. Swope: We have everything here except the Sterling Act.

The Court (Judge Neely): The one you have here is the one we will admit.

Mr. Swope: That's right.

The Court (Judge Neely): You have it identified as an exhibit please.

(Defendant's Exhibit No. 1, consisting of record, briefs and Philadelphia Ordinance, were produced and marked for identification.)

Mr. Keefer: We offer in evidence on behalf of the defendant and ask it be identified as Defendant's Exhibit No. 1 various documents involved in the case of National Biscuit Company versus Philadelphia, 374 Pennsylvania 604, which are as follows:

The Court (Judge Neely): Are they set forth in the stipulation?

Mr. Keefer: Yes, they are.

The Court (Judge Neely): Are as set forth in the stipulation.

Mr. Keefer: Which are as set forth in Paragraph 19 of the Stipulation of Facts.

The Court (Judge Neely): Defendant's Exhibit No. 1 is admitted in evidence in accordance with the stipulation of the parties. It need not be transcribed as part of the record in this proceeding.

Mr. Keitel: We, of course, wish to reiterate our objection as to the relevancy of this exhibit.

The Court (Judge Neely): You are objecting to its relevancy, but you have stipulated it may be admitted.

Mr. Keitel: Subject to our objection as to relevancy, may it please the Court, and that is true as to everything in the stipulation. Both parties have reserved that point.

(Whereupon, discussion off the record.)

Mr. Keefer: There is one other matter that I would like to refer to in the Stipulation of Facts. Mr. Keitel, Deputy Attorney General, agreed this morning that there may be added a clause at the end of the second paragraph in Paragraph 19 of the Stipulation of Facts, the clause being, and this is the part to be added:

"And of the capital stock tax previously imposed on foreign corporations."

Mr. Keitel agrees to that, so the Court will admit that.

The Court (Judge Neely): You agree, Mr. Keitel?

Mr. Keitel: Yes, we agree, subject, of course, to the same objection as to relevancy.

The Court (Judge Neely): Admitted.

(Defendant's Exhibit No. 2, being appeal and specification of objections, and Defendant's Exhibit No. 3, being the appeal bond, were produced and marked for identification.)

Mr. Keefer: We would like to offer in evidence on behalf of the defendant Defendant's Exhibit No. 2, being the appeal and specification of objections, and Defendant's Exhibit No. 3, being the appeal bond.

The Court (Judge Neely): Any objection?

Mr. Keitel: No objection.

The Court (Judge Neely): Admitted.

Mr. Keefer: Defendant rests.

(Whereupon, at 11:30 o'clock a.m., trial concluded.)

COMMONWEALTH'S EXHIBIT NO. 1

1952 Franchise Tax Report and Franchise Tax Settlement Thereon.

(Report not printed, copies to be handed up to court. Settlement printed at pages 13a-14a, *Supra.*)

COMMONWEALTH'S EXHIBIT NO. 2.

Petition for Resettlement.

IN THE DEPARTMENT OF REVENUE
OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR RESETTLEMENT OF FRANCHISE TAX IMPOSED AGAINST NATIONAL BISCUIT COMPANY FOR THE CALENDAR YEAR 1952

To the HONORABLE OTTO F. MESSNER, Secretary of Revenue, and the HONORABLE CHARLES R. BARBER, Auditor General.

Sirs:

The Petition of National Biscuit Company, hereinafter referred to as Petitioner, for resettlement of Franchise Tax imposed against it for the year 1952 respectfully represents:

A. FORMAL AVERMENTS.

a. The name of the Corporation is National Biscuit Company. Its principal address is 449 West 14th Street, New York, New York. Its registered address in Pennsylvania is Fidelity-Philadelphia Trust Building, 123 South Broad Street, Philadelphia, Pennsylvania, c/o C. T. Corporation System.

b. The box number appearing on the certified copy of the settlement is 2295-07.

c. The year involved is 1952. The amount of tax assessed was $58,321.60. The amount of tax petitioner claims is correct is not over $25,992.95.

d. The tax involved is the so-called "Franchise Tax" imposed by the Act of May 16, 1935, P. L. 184 as amended (which amended sections 20 and 21 of the Act of June 1, 1889, P. L. 420 as amended), 72 Purdon's Statutes, 1871.

B. Items to Which Petitioner Takes Exception.

Petitioner takes exception to the computation of the tax under the formula as provided in said Act of 1935 as amended, which necessarily imposes the tax upon its investments in United States Securities, and upon its tangible and intangible property having a situs outside of Pennsylvania. Petitioner contends that its tax should be settled in accordance with the following formula, to wit, the ratio of tangible property in Pennsylvania to total assets times the Capital Stock valuation times the tax rate of five mills:

$$\frac{6,333,877}{194,941,349} \times 160,000,000 \times 5 \text{ mills}$$

C. Summary Statement of the Reasons Upon Which the Taxpayer Relies.

Facts.

Petitioner was incorporated under the laws of the State of New Jersey on February 3, 1898. It registered and qualified to do business in Pennsylvania on March 28, 1899, and reregistered on August 21, 1933 under the Business Corporation Law of 1933 to engage

in Pennsylvania in the business of "manufacture and sale of bakery products".

During the year 1952, Petitioner was engaged within and without Pennsylvania in the manufacture and sale of bakery products; and, also, it was engaged exclusively outside of Pennsylvania in the ownership, control and supervision of its intangible assets which included United States securities and shares of stock of subsidiary companies operating in foreign countries. The business of the subsidiary companies was independent of and unrelated to the business conducted by Petitioner in the United States, including Pennsylvania.

Using a report blank furnished to it by the Department of Revenue, Petitioner duly filed with that Department its "Franchise Tax" Report for 1952, which is incorporated herein by reference, along with the facts and figures therein set forth. As indicated on this Report, Petitioner in 1952 had 365 places of business, 21 in Pennsylvania and 344 outside of Pennsylvania; its President and Treasurer were located and performed their duties at 449 West 14th Street, New York, New York; no Assistant Treasurer or Assistant Secretary resided or performed his duties in Pennsylvania; the annual meeting of its stockholders was held at 1 Exchange Place, Jersey City, New Jersey; and its directors met, its principal bank account was maintained and its bonds and securities, etc., were kept, in New York City.

Also, as indicated in part on that Report, the assets of the Company included, inter alia, the following, at December 31, 1952:

Investment in United States Securities	$26,300,000.00
Investment in shares of subsidiary companies operating in foreign countries	8,823,465.17
Tangible property in Pennsylvania	6,333,877.00

On the basis of the above mentioned report and pursuant to the purported provisions of the Act of May 16, 1935, P. 6, 184, as amended, the Department of Revenue, on October 28, 1953, settled and, on November 5, 1953, the Department of the Auditor General approved settlement of "Franchise Tax" against petitioner for the year 1952. A true and correct copy of said settlement mailed to Petitioner on November 16, 1953, is attached hereto, made a part hereof, and marked Exhibit "A".

Said tax was paid as follows:

March 5, 1953	$58,308.88
March 7, 1952 (transfer of credit)	12.72
Total	$58,321.60

In the said "Franchise Tax" settlement, the taxable valuation to which the tax rate is applied is determined to be $11,664,320. On a property tax basis, to wit, the ratio of tangible property in Pennsylvania to total assets times the Capital Stock valuation of $160,000,000

$$\left(\frac{6,333,877}{194,941,349} \times 160,000,000 = 5,198,591\right),$$

the taxable valuation is $5,198,591. The excess of the taxable valuation on the "Franchise Tax" basis over the taxable valuation on the property tax basis, or $6,465,729, represents the taxable value attributable to Petitioner's tangible and intangible assets which have their situs, domiciliary, business or commercial, outside of Pennsylvania, including large investments in U. S. Securities and subsidiaries in foreign countries above mentioned.

Discussion.

On June 26, 1953, the Supreme Court of Pennsylvania held that the so-called Pennsylvania "Franchise Tax" is a *property tax,* and not an excise tax. *National Biscuit Company v. Philadelphia,* 374 Pa. 604. This case arose upon a Bill in Equity filed by your Petitioner and is the last expression of opinion by said Court as to the nature of the tax. For purposes of this petition, it must be accepted as expounding the controlling judicial interpretation of the law.

This is practically true, since the prior decisions of that Court were repeatedly inconsistent in expounding the nature of the *same tax* as follows:

Year of Decision	*Case*	*Nature of Tax*
1938	*Blauner's Inc. v. Philadelphia* 330 Pa. 342	Property Tax
1939	*Com. v. Columbia Gas & Electric Corporation,* 336 Pa. 209	Excise Tax
1940	*Philadelphia v. Samuels,* 338 Pa. 321	Property Tax
1945	*Com. v. Ford Motor Company,* 350 Pa. 236	Excise Tax
1945	*Com. v. Quaker Oats Company,* 350 Pa. 253	Excise Tax
1945	*Com. v. Monessen Amusement Company,* 352 Pa. 120	Excise Tax
1948	*Federal Drug Co. v. Pittsburgh,* 358 Pa. 454	Property Tax
1950	*Murray v. Philadelphia,* 364 Pa. 157	Property Tax
	to which list there is now added, as above described:	
1953	*National Biscuit Company v. Phila., supra*	Property Tax

If, as the Pennsylvania Supreme Court has now finally decided, the so-called Pennsylvania "Franchise Tax" is a property tax, and not an excise tax, United States securities may not be subjected to the tax. Thus in *Com. v. Curtis Publishing Co.*, 363 Pa. 299, 312 (1949), the Pennsylvania Supreme Court said:

> "If the Pennsylvania Corporate Net Income Tax is to be deemed a property tax, the inclusion of interest on United States securities in the tax base constitutes a direct tax upon such interest which is unconstitutional under the foregoing authorities."

The Court quoted (p. 311) from *Missouri etc. v. Gehner et al.* 281 U. S. 313, as follows:

> "It is elementary that the bonds or other securities of the United States may not be taxed by state authority."

Moreover, insofar as the present tax amounts to a property tax upon United States securities, it is invalid as in conflict with Section 3701 of the Revised Statutes of the United States, which provides that "all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals of New Jersey et al.*, 338 U. S. 665.

Furthermore, Pennsylvania cannot impose a property tax upon extraterritorial assets of a foreign corporation because it has no jurisdiction to tax such assets. In the case of *Com. v. Curtis Publishing Co.*, 237 Pa. 333 (1912), the Supreme Court of Pennsylvania held that the situs of the intangible assets of a foreign corporation doing business in Pennsylvania,

in the absence of any statutory provision to the contrary, was the domicile of such foreign corporation and, therefore, such intangible assets were not subject to property tax in Pennsylvania.

Furthermore, if the so-called "Franchise Tax" is a property tax it cannot be imposed upon such assets, because the exemption of United States securities and tangible property located outside of Pennsylvania, allowed under the Pennsylvania Capital Stock Tax, would cause it to violate the Uniformity Clause of the Pennsylvania Constitution, as the Supreme Court admitted in *Commonwealth v. Ford Motor Company, supra,* at 350 Pa. 250, where it said:

> "The alleged discrimination in our tax laws against foreign corporations and in favor of domestic corporations is said to lie in the fact that domestic corporations enjoy certain exemptions in the computation of their tax base which are denied to foreign corporations. In this contention there is apparent again appellant's studied confusion of the essential differences between a *property* tax and a *franchise* tax. Certain property of domestic corporations, including United States obligations and tangible property having an extraterritorial location is excluded from the valuation of their capital stock for purposes of the direct tax. Obviously, this property could not constitutionally be included. . . ."

It is quite clear from this quotation that if the "Franchise Tax" is a property tax, similar property of foreign corporations must be excluded from the computation of the tax in order to avoid discrimination against foreign corporations.

Under the Constitutions, both of the United States and of Pennsylvania, your petitioner has the right to

be heard in the courts and to have its tax liability determined according to law and justice. In the *National Biscuit* case, *supra*, your petitioner contended that it was not subject to the so-called Mercantile License Tax imposed by the City of Philadelphia, under an enabling act known as the Sterling Act, being the Act of August 5, 1932, P. L. 45, which prohibited the City of Philadelphia from taxing any privilege, transaction, subject, occupation or personal property then or thereafter subject to a State tax or license fee. This enabling act has been construed to prohibit duplication of the same character of taxation by the State and by the City. Your petitioner contended that it was not subject to the Philadelphia tax because the latter was an Excise Tax and therefore duplicated, among others, the Pennsylvania Franchise Tax, which itself was also an Excise Tax, relying upon the cases cited above in which the Supreme Court of Pennsylvania had so held. That Court, however, decided the said case against your petitioner, thereby subjecting it to the Philadelphia tax, upon the ground that the Philadelphia tax was an Excise Tax but that the Pennsylvania Franchise Tax was a property tax and not an excise tax. The rights of your petitioner thus having been determined by the Supreme Court of Pennsylvania adversely on the basis that the Pennsylvania Franchise Tax is a property tax and not an excise tax, it necessarily follows that the imposition of the present tax upon your petitioner, to the extent that it draws into the tax base property having a situs outside of Pennsylvania, whether tangible or intangible, and United States securities owned by your petitioner, is illegal and unconstitutional for reasons specifically set forth elsewhere in this Petition. Furthermore, if, upon the present proceedings initiated by this Petition, the fiscal officers of the Commonwealth should continue

to attempt to impose the tax upon the aforesaid assets, and if any such determination should later be upheld by the courts of the Commonwealth, such determination and/or decision would be inconsistent with the prior decision rendered against your petitioner, would subject petitioner to simultaneous double taxation under two mutually exclusive taxing statutes, would be arbitrary and unreasonable, and would violate the Pennsylvania and Federal Constitutions as more specifically referred to elsewhere in this Petition. Inasmuch as the several decisions of the Supreme Court of Pennsylvania have in each case upheld the power to tax, but upon inconsistent theories as to the nature of the tax, if the decision of the Supreme Court in *National Biscuit Company v. Philadelphia, supra,* should not be followed in this proceeding, representing another reversal of theory as to the nature of the tax, your petitioner avers that it will have been denied a fair trial in the courts and a reasonable adjudication of its rights, all of which would violate the Pennsylvania and Federal Constitutions in the particular respects elsewhere in this Petition set forth.

Cases, Statutes and Constitutional Limitations Involved.

1. The tax settlement against petitioner for 1952 having been made upon the theory that the tax is an excise tax and not a property tax is contrary to the Decision of the Supreme Court of Pennsylvania in *National Biscuit Company v. Philadelphia,* 374 Pennsylvania, 604 (1953), and other Decisions of that Court holding the tax to be a property tax.

2. The tax imposed under the provisions of the Act of May 16, 1935, P. L. 184, as amended, having been held to be a property tax as aforesaid, the "fran-

chise tax'' settlement made against your petitioner for 1952 pursuant thereto violates:

(a) Article VI, Clause 2, and Article I, Section 8, Clause 2 of the Constitution of the United States in that the tax is imposed in part upon Petitioner's investment in United States securities.

(b) Section 3701 of the Revised Statutes of the United States, 31 U. S. C. Section 742, which generally exempts interest-bearing obligations of the United States from State and local taxation.

(c) The due process and property clauses, Sections 1, 9 and 10 of Article I of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that tax is imposed upon tangible and intangible assets of Petitioner which have their situs, outside of Pennsylvania, and which therefore are beyond the taxing power and jurisdiction of Pennsylvania.

(d) The uniformity clause of Section 1 of Article IX of the Constitution of the Commonwealth of Pennsylvania and the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions granted to domestic corporations are denied to your petitioner, a foreign corporation.

3. If this tax settlement made against Petitioner for 1952 should now be upheld by the Courts of Pennsylvania upon the ground that the tax is an excise tax, such a decision would violate:

(a) The due process clauses of Sections 1, 9 and 10 of Article I of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(b) The uniformity clause of Section 1 of Article IX of the Constitution of Pennsylvania and the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(c) Section 1 of Article III of the Constitution of the Commonwealth of Pennsylvania.

(d) Sections 11 and 12 of Article I of the Constitution of Pennsylvania.

(e) Section 2, clause 1 of Article IV of the Constitution of the United States.

(f) Clause 2 of Article VI of the Constitution of the United States.

D. Relief Prayed.

Wherefore, Petitioner prays that the "Franchise Tax" settled against it for the year 1952 be resettled by eliminating therefrom any tax or portion thereof imposed upon or with respect to Petitioner's investment in United States securities, its intangible assets, and/or its other assets having a situs outside of Pennsylvania; and further that the tax be resettled at not over $25,992.95, being at the rate of 5 mills on $5,198,591; and that a credit be allowed for the amount of tax overpaid in at least the amount of $32,328.65.

Petitioner desires a hearing.

Respectfully submitted,

National Biscuit Company

By /s/ G. A. Mitchell,
Vice President.

(Corporate Seal)

Attest:

/s/ A. T. Bullock,
Secretary.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

G. A. Mitchell, being duly sworn, according to law, deposes and says that he is Vice President of NATIONAL BISCUIT COMPANY; that he is duly authorized to make this affidavit in its behalf; that the foregoing Petition is not made for the purpose of delay, but because Petitioner believes injustice has been done by the settlement of the account for Franchise Tax for the calendar year 1952; that he has read the foregoing Petition and the facts stated therein including facts and figures incorporated by reference are true and correct, according to the best of his knowledge, information and belief.

/s/ G. A. MITCHELL.

Sworn to and subscribed before me this 18th day of January, 1954.

/s/ WILLIAM H. PETERSON,
(Notary's Seal) *Notary Public.*

William H. Peterson
Notary Public, State of New York
No. 31-8344000
Qualified in New York County
Certificates Filed With:
N. Y. Co. Clk. & N. Y. Co. Register's Office
Bronx Co. Clk. & Bronx Co. Reg's Office
Term Expires March 30, 1954

* * *

WE HEREBY CERTIFY that this Petition was prepared by Roy J. Keefer, of Hull, Leiby and Metzger, Attorneys at Law, Harrisburg, Pennsylvania, and by Leslie M. Swope, of Drinker, Biddle & Reath, Attorneys at Law, Philadelphia, Pennsylvania, both of counsel for the Petitioner; that we know of our own knowledge that certain facts therein set forth are true and that all other averments are made on information obtained from the officers and records of Petitioner, and are believed by us to be true.

/s/ ROY J. KEEFER,
Roy J. Keefer,
HULL, LEIBY AND METZGER,
/s/ LESLIE M. SWOPE,
Leslie M. Swope,
DRINKER, BIDDLE & REATH,
Attorneys for the Company.

EXHIBIT A — FRANCHISE TAX SETTLEMENT.

Printed as Exhibit A, Appeal and Specification of Objections at Pages 13a-14a, *Supra.*

COMMONWEALTH'S EXHIBIT NO. 3.

Order Refusing Petition for Resettlement.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF REVENUE
Harrisburg

February 16, 1954

In your reply please
refer to CB:ASB
Box No. 2295-07

HULL, LEIBY & METZGER
208-210 Walnut Street,
Harrisburg, Penna.

In re: National Biscuit Company
449 W. 14th Street,
New York, N. Y.
1952 Franchise Tax

Gentlemen:

AND NOW, TO WIT, 2/11/54 the prayer of the petitioner for the resettlement of the above stated account is hereby refused.

AUDITOR GENERAL'S DEPARTMENT
Harrisburg, Pennsylvania
Approved:

(s) ROBERT B. MARKIW
For Auditor General

DEPARTMENT OF REVENUE
Harrisburg, Pennsylvania
(s) SAMUEL C. HARRY
For Secretary of Revenue

COPY MAILED Feb 17-1954

COMMONWEALTH'S EXHIBIT NO. 4.

Petition for Review.

IN THE TREASURY DEPARTMENT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR REVIEW OF FRANCHISE TAX IMPOSED AGAINST NATIONAL BISCUIT COMPANY FOR THE CALENDAR YEAR 1952.

Box 2295-07

TO THE HONORABLE, THE BOARD OF FINANCE AND REVENUE

Sirs:

The petition of NATIONAL BISCUIT COMPANY, hereinafter referred to as petitioner, for review of franchise tax settled against it for the year 1952, and of the refusal by the taxing departments of its Petition for Resettlement of said account, respectfully represents:

On January 26, 1954, petitioner filed with the Department of Revenue its Petition for Resettlement of "Franchise Tax" settled against it by the Department of Revenue on October 28, 1953, and approved by the Department of the Auditor General on November 5, 1953.

On February 11, 1954, after hearing thereon, the Department of Revenue and the Department of the Auditor General refused the prayer of said Petition for Resettlement. A true and correct copy of the notice of refusal, mailed to petitioner on February 17, 1954, is attached hereto, made a part hereof and marked Exhibit "A".

Petitioner respectfully requests your Honorable Board to review the settlement of "Franchise Tax" made against petitioner for the year 1952 and the

refusal by the taxing departments of its Petition for Resettlement of said account. Petitioner's reasons in support thereof are fully set forth in said Petition for Resettlement which is incorporated herein by reference.

WHEREFORE, petitioner prays your Honorable Board to resettle the "Franchise Tax" settled against it for the year 1952 by eliminating therefrom any tax or portion thereof imposed upon or with respect to petitioner's investment in United States securities, its intangible assets, and/or its other assets having a situs outside of Pennsylvania; and further that the tax be resettled at not over $25,992.95, being at the rate of five mills on $5,198,591; and that a credit be allowed for the amount of tax overpaid in at least the amount of $32,328.65.

Petitioner desires a hearing.

Respectfully submitted,

NATIONAL BISCUIT COMPANY

By /s/ G. A. MITCHELL
Vice President

Attest:
(Seal)

/s/ A. T. BULLOCK
Secretary

March 9, 1954.

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

G. A. MITCHELL, being duly sworn, according to law, deposes and says that he is Vice President of NATIONAL BISCUIT COMPANY; that he is duly authorized to make this affidavit in its behalf; that the foregoing petition is not made for the purpose of delay, but because petitioner believes injustice has been done by the settlement of the account for franchise tax for the calendar year 1952 and by the refusal of its Petition for Resettlement of said account; that he has read the foregoing petition and the facts stated therein, including facts and figures incorporated by reference, are true and correct, according to the best of his knowledge, information and belief.

/s/ G. A. MITCHELL

Sworn to and subscribed before me this 9th day of March, 1954.

WILLIAM H. PETERSON,
Notary Public.
(Seal)

WILLIAM H. PETERSON,
Notary Public, State of New York
No. 31-8344000
Qualified in New York County
Certificates Filed with:
N. Y. Co. Clk. & N. Y. Co. Register's Office
Bronx Co. Clk & Bronx Co. Reg's Office
Term Expires March 30, 1954.

• • •

WE HEREBY CERTIFY that this petition was prepared by Roy J. Keefer of Hull, Leiby and Metzger, Attorneys at Law, Harrisburg, Pennsylvania, and by Leslie M. Swope of Drinker, Biddle & Reath, Attorneys at Law, Philadelphia, Pennsylvania, both of counsel for the petitioner; that we know of our own knowledge that certain facts therein set forth are true and that all other averments are made on information obtained from the officers and records of petitioner, and are believed by us to be true.

/s/ ROY J. KEEFER,
Roy J. Keefer.
HULL, LEIBY AND METZGER,
/s/ LESLIE M. SWOPE,
Leslie M. Swope,
DRINKER, BIDDLE & REATH,
Attorneys for the Company.

EXHIBIT A — ORDER REFUSING PETITION FOR RESETTLEMENT.

Printed as Commonwealth's Exhibit No. 3, at Page 38a, *supra.*

COMMONWEALTH'S EXHIBIT NO. 5.

Order Refusing Petition for Review.

Docket No. R-12617

IN RE: National Bisquit Company

PETITION FOR REVIEW of action taken by the Department of Revenue and approved by the Department of Auditor General on petition for resettlement of franchise tax for 1952.

AND NOW TO WIT March 17th, A. D. 1954, I certify that the following is the action of the Board of Finance and Revenue of the Commonwealth of Pennsylvania in this matter:

> "And now to wit March 17th, A. D. 1954,
> This petition for review is refused and the action taken by the Department of Revenue, approved by the Department of Auditor General, is hereby sustained."

BY ORDER OF THE BOARD OF FINANCE AND REVENUE

WELDON B. HEYBURN, State Treasurer and Chairman,
FRANK F. TRUSCOTT, Attorney General,
GENE D. SMITH, Secretary of the Commonwealth,
CHARLES R. BARBER, Auditor General,
OTTO F. MESSNER, Secretary of Revenue.

ATTEST: /s/ ELMER G. GRAHAM,
(Seal) Secretary Board of Finance and Revenue.

Copy mailed to: on
HULL, LEIBY & METZGER, March 17, 1954
Attorneys at Law,
Harrisburg, Pennsylvania.

COMMONWEALTH'S EXHIBIT NO. 6.

Transcript of Ledger Account.

Commonwealth of Pennsylvania

October 10, 1955.

Subject: National Biscuit Company
Box No. 2295-07
1952 Franchise Tax

To: John Rively, Chief
Judicial Section
Bureau of Corporation Taxes

From: Alex E. Cohen, Assistant Director
Receipts Accounting Division
Department of Revenue

Transcript of the ledger account for the above subject is as follows:

Date		*Debit*	*Credit*	*Balance*
3-7-52	Transfer Credit		12.72	12.72 Cr.
3-5-53	Payment		58,308.88	58,321.60 Cr.
11-5-53	Settlement	58,321.60		0.00
		Alex E. Cohen		

COMMONWEALTH'S EXHIBIT NO. 7.

Stipulation of Facts.

AND Now, October 11, 1955, it is agreed by and between counsel for the COMMONWEALTH OF PENNSYLVANIA and counsel for NATIONAL BISCUIT COMPANY, defendant, that the following facts are true and correct and shall be made a part of the record in this case:

1. Defendant was incorporated under the laws of the State of New Jersey on February 3, 1898. It registered and qualified to do business, in Pennsylvania on March 28, 1899 and re-registered on August 21, 1933, under the Business Corporation Law of 1933 to engage in Pennsylvania in the business of "manufacture and sale of bakery products."

2. Defendant's principal office and address are at 449 West Fourteenth Street, New York, New York; and its registered address in Pennsylvania is Fidelity-Philadelphia Trust Building, 123 South Broad Street, Philadelphia, Pennsylvania, c/o C. T. Corporation System.

3. During the year 1952, defendant had 365 places of business, 21 in Pennsylvania and 344 outside of Pennsylvania; its President, Secretary and Treasurer were located and performed their duties at 449 West Fourteenth Street, New York, New York; no Assistant Treasurer or Assistant Secretary resided or performed his duties in Pennsylvania; the annual meeting of its stockholders was held at 1 Exchange Place, Jersey City, New Jersey; and its directors met, its principal bank account was maintained, and its bonds, securities, etc., were kept, in New York City.

4. During the year 1952, defendant was engaged within and without Pennsylvania in the manufacture and sale of bakery products; and it held, owned and controlled at its principal office in New York City its investments in United States securities and in shares of stock of subsidiary companies operating in foreign countries. These investments were made, all activities in connection therewith were carried on, and all income therefrom was received, by that office.

5. For the purposes of this case the business of the subsidiary companies was independent of and unrelated to the business conducted by defendant in the United States, including Pennsylvania.

6. Defendant, at its principal office at 449 West Fourteenth Street, New York, New York, performed administrative and executive functions involving management and control which included production, expenditures, investments, purchasing, pricing, advertising, sales programming, credit, personnel, compensation, accounting, taxes and legal services.

7. The tax involved is the so-called "Franchise Tax", imposed under the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184, and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462, 72 Purdon's Statutes, Sections 1871 and 1901. These acts will be referred to herein as the Act of 1935 and amendments.

8. Using a report form furnished to it by the Department of Revenue, defendant duly completed and filed with that Department its "Franchise Tax" report for the year 1952, which is incorporated herein by reference.

9. As shown by said report and by the corresponding report for 1951, defendant owned inter alia the following as of January 1, 1952 and as of December 31, 1952:

	January 1, 1952	*December 31, 1952*
Investment in United States securities	$ 19,108,500.00	$ 26,300,000.00
Investment in shares of stocks of subsidiary companies operating in foreign countries (More than fifty percent owned)	7,883,161.00	8,823,465.00
Investment in tangible property in Pennsylvania	7,006,593.00	6,333,877.00
Cash—demand deposits	17,377,854.00	13,620,326.00
Accounts Receivable	12,520,993.00	10,229,670.00
Total Assets	185,986,841.00	194,941,349.00

10. On the basis of said report and pursuant to the purported provisions of the Act of 1935 and amendments, the Department of Revenue, on October 28, 1953, settled and, on November 5, 1953, the Department of the Auditor General approved settlement of a so-called "Franchise Tax" against defendant for the year 1952. A true and correct copy of said settlement, mailed to defendant on November 16, 1953, is attached hereto, made a part hereof and marked Exhibit "A".

11. Said settlement was made by the taxing departments upon the theory that the tax imposed by the Act of 1935 and amendments was an excise tax on

foreign corporations for the privilege of doing business in Pennsylvania:

(a) In said settlement, the taxable value is determined by applying the statutory allocation fractions of tangible property, wages and gross receipts to defendant's entire capital stock valuation of $160,000,000 as determined by the taxing departments and the resulting taxable value is $11,664,320, to which the tax rate of five mills is applied.

(b) If the taxable value were determined by applying the ratio of defendant's average tangible property in Pennsylvania over its total assets times its entire capital stock valuation ($\frac{6,670,235}{194,941,349} \times 160,000,000$), the resulting taxable value would be $5,474,659. It is agreed that this was the method used in settling capital stock tax against defendant and other foreign corporations under Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, prior to the amendments thereto by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462.

12. In appraising defendant's entire capital stock at a valuation of $160,000,000, the taxing departments included all of the defendant's tangible and intangible assets as listed in the Balance Sheet of its "Franchise Tax" report for 1952, except its investment in shares of stock of subsidiary companies operating in foreign countries. This investment and the income derived therefrom were excluded by the taxing departments in the appraisal of defendant's capital stock.

13. In settling capital stock tax (construed by the Pennsylvania courts to be a property tax) against

Pennsylvania corporations for the year 1952, the taxing departments treated as exempt or non-taxable assets, investments of such corporations in:

(a) Securities of the United States, its agencies and instrumentalities;

(b) Commonwealth of Pennsylvania bonds;

(c) Shares of foreign corporations more than fifty percent owned whose capital stock represented property and assets located or having a situs outside of Pennsylvania;

(d) Shares of other Pennsylvania corporations liable to or relieved from payments of Capital Stock Tax to Pennsylvania;

(e) Shares of banks and banks and trust companies paying tax on their shares to Pennsylvania; and

(f) Tangible property located outside of Pennsylvania;

whereas such investments of foreign corporations were not accorded similar treatment by the taxing departments in the settlements of the so-called "Franchise Tax" made against foreign corporations, including the defendant, for the year 1952. In the case of Pennsylvania corporations, the tax formula is the tax rate times the taxable value which is obtained by applying the ratio of non-exempt or taxable assets to total assets times the capital stock valuation. In the case of foreign corporations, the tax formula is the tax rate times the taxable value which represents the sum of the results obtained by applying each of the three statutory allocation fractions, where applicable as provided in the 1935 Act and amendatory Acts, to one-third of the capital stock valuation. The Commonwealth objects to the materiality and relevancy of the facts set forth in this paragraph.

14. On January 26, 1954, the defendant filed with the Department of Revenue its Petition for Resettlement of the "Franchise Tax" settled against it for the year 1952 (which Petition is incorporated herein by reference). On February 11, 1954, the Departments of Revenue and Auditor General refused the prayer of said Petition for Resettlement. A true and correct copy of the Notice of Refusal, mailed to defendant under date of February 17, 1954, is attached hereto, made a part hereof and marked Exhibit "B".

15. On March 11, 1954, defendant filed with the Board of Finance and Revenue its Petition for Review of the action of the Departments of Revenue and Auditor General in refusing its Petition for Resettlement (which Petition for Review is incorporated herein by reference); and on March 17, 1954, the said Board refused the prayer of its Petition for Review. A true and correct copy of the Notice of Refusal is attached hereto, made a part hereof and marked Exhibit "C".

16. On April 14, 1954, defendant duly filed with the Prothonotary of Dauphin County its Appeal and Specification of Objections to said settlement and to the refusal of its Petition for Review by the Board of Finance and Revenue; and on May 18, 1954, defendant duly filed an appeal bond as required by law.

17. Defendant made payment in full of the "Franchise Tax" settled against it for the year 1952, as follows:

By check—March 5, 1953	$58,308.88
By transfer of 1951 "Franchise Tax" credit	— 12.72
Total	$58,321.60

18. In the event that the tax settlement against defendant is sustained, it is agreed that judgment should be entered in favor of the Commonwealth and against defendant in the amount of $58,321.60, which, having been duly paid, should be marked satisfied. If the Court finally determines that Sections 20 and 21 of the Act of June 1, 1889, P. L. 420 as amended by the Act of May 16, 1935 P. L. 184 and subsequent amendatory acts (the last relevant amendatory act being the Act of May 29, 1951, P. L. 462) imposes a property tax on defendant which is determinable on the basis of the computation in Paragraph 11 (b) of this Stipulation, it is agreed that judgment should be entered in favor of the Commonwealth and against the defendant in the amount of $27,373.30, which having been paid should be marked satisfied and a credit of $30,948.30, representing tax overpayment by defendant should be directed to be entered in favor of defendant on the proper books and records of the Departments of Revenue and Auditor General.

In the event that the Court finally determined this case on any basis other than those hereinbefore set forth in this paragraph, the parties agree that the Record in the present case shall be reopened in order to submit to the Court such additional evidence as may be necessary to enable it to enter judgment.

19. It is further stipulated and agreed by and between counsel for the Commonwealth of Pennsylvania and counsel for National Biscuit Company, defendant, that the entire record in the case of *National Biscuit Company v. Philadelphia*, 374 Pa. 604 (National Biscuit Company, one of the appellees in this case is the same as the defendant in the present proceeding) shall be incorporated in the record of the present proceeding by reference as evidence of the

facts and issues in that proceeding, without the necessity of copying the same in the transcript of the record in the present proceeding; and that any part or parts thereof may be quoted in the argument and briefs by either party hereto at any stage, including any appellate stage, of this proceeding, as though fully appearing in the record in the present proceeding, subject to the right of the adverse parties to object to the relevancy or materiality thereof. For the purposes of this paragraph, it is further agreed that the said record shall include, but not be limited to, Appellants' printed Record (Nos. 214, 215 and 216 January Term, 1953), Appellees' printed Supplemental Record (Nos. 214, 215 and 216 January Term, 1953), the Philadelphia Ordinance and the Sterling Act (Act of August 5, 1932, Special Session 1932, P. L. 45) there involved, Appellee's Petition for Reargument (No. 214 January Term, 1953), the opinions of the several justices of the Supreme Court of Pennsylvania, and also, Appellants' Brief and Supplemental Brief (Nos. 214, 215 and 216 January Term, 1953), and Appellees' Brief and Reply Brief (Nos. 214, 215 and 216 January Term, 1953).

The parties hereto further agree that the court, in considering the issues raised in the present proceeding, may examine the printed Briefs and Records and statutes or ordinances in any case decided by the courts of this Commonwealth involving the nature of the Franchise Tax imposed by the Act of 1935 and amendments and of the capital stock tax previously imposed on foreign corporations.

20. The parties hereto reserve the right to introduce additional evidence, not inconsistent herewith, into the record at the time of trial; and to object

to the relevancy or materiality of any such additional evidence offered into the record and to any of the facts contained in the preceding paragraphs herein.

/s/ GEORGE W. KEITEL,
Deputy Attorney General of the Commonwealth of Pennsylvania.

HULL, LEIBY AND METZGER,

By /s/ ROY J. KEEFER,

DRINKER, BIDDLE AND REATH,

By /s/ LESLIE M. SWOPE,
Attorneys for the Defendant.

EXHIBIT A—1952 FRANCHISE TAX SETTLEMENT.

Printed as Exhibit A. Appeal and Specification of Objections at Pages 13a-14a, Supra.

EXHIBIT B—ORDER REFUSING PETITION FOR RESETTLEMENT.

Printed as Commonwealth's Exhibit No. 3 at Page 38a, Supra.

EXHIBIT C—ORDER REFUSING PETITION FOR REVIEW.

Printed as Commonwealth's Exhibit No. 5 at Page 43a, Supra.

COMMONWEALTH'S EXHIBIT No. 8.

Agreement to Try Without Jury.

It is agreed that a trial by jury be dispensed with in the above stated case, and that the same be submitted to the decision of the Court to be heard and determined under the provisions of an act entitled "An Act to provide for the submission of civil cases to the decision of the court; and to dispense with trial by jury", approved the 22nd day of April, 1874, P. L. 109, subject, however, to a writ of error as in other cases, at the option of either party.

/s/ GEORGE W. KEITEL,
Deputy Attorney General.
/s/ ROY J. KEEFER,
Counsel for Defendant.

AMENDMENTS TO STIPULATION OF FACTS.

AND Now, January 20th, 1956, it is agreed by and between counsel for the Commonwealth of Pennsylvania and counsel for National Biscuit Company, defendant, that Paragraph 11(b) and Paragraph 18 of the Stipulation of Facts, which has been filed as part of the Record in this case and has been designated as Commonwealth's Exhibit No. 7, shall be amended and as amended shall become a part of the Record in this case and shall read as follows:

"11(b) If the taxable value were determined by applying the ratio of defendant's average tangible property in Pennsylvania over its total assets less its investment in stocks of foreign subsidiaries times its capital stock valuation ($\frac{6,670,235}{194,941,349 - 8,823,465} \times \$160,000,000$), the resulting taxable value would be $5,734,202, which times the tax rate of five mills produces tax of $28,671.01. It is agreed that the method used in settling capital stock tax against defendant and other foreign corporations under Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, prior to the amendments thereto by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462, was the ratio of average tangible property in Pennsylvania over *total* assets times the *entire* capital stock value. The difference between this formula and that set forth above as applicable to defendant under the property tax theory for the year 1952 is caused by the fact, as disclosed in para-

graph 12 of the Stipulation of Facts, that defendant's investments in stocks of subsidiaries and the income derived therefrom were excluded in the appraisal of its capital stock at $160,000,000, it being the intention of the parties hereto that said exclusion of stocks of subsidiaries and the income therefrom in said appraisal is not at issue for the purposes of this case."

"18. In the event that the tax settlement against defendant is sustained, it is agreed that judgment should be entered in favor of the Commonwealth and against defendant in the amount of $58,321.60, which, having been duly paid, should be marked satisfied. If the Court finally determines that Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184, and subsequent amendatory acts (the last relevant amendatory act being the Act of May 29, 1951, P. L. 462) imposes a property tax on defendant which is determinable on the basis of the computation in Paragraph 11(b), as amended, of this Stipulation, it is agreed that judgment should be entered in favor the Commonwealth and against defendant in the amount of $28,671.01, which having been paid should be marked satisfied and a credit of $29,650.59, representing tax overpayment by defendant should be directed to be entered in favor of defendant on the proper books and records of the Departments of Revenue and Auditor General."

"In the event that the Court finally determines this case on any basis other than those hereinbefore set forth in this paragraph, the parties agree that the Record in the present case

shall be reopened in order to submit to the Court such additional evidence as may be necessary to enable it to enter judgment."

As herein amended, the parties agree that the said Stipulation of Facts shall remain in full force and effect.

/s/ GEORGE W. KEITEL,
Deputy Attorney General of the Commonwealth of Pennsylvania.

HULL, LEIBY AND METZGER,

By /s/ ROY J. KEEFER,
Attorneys for the Defendant.

ORDER.

AND NOW, this 25th day of January, 1956, the above Amendments to the Stipulation of Facts is admitted in evidence as part of the Record in the above entitled case.

WILLIAM H. NEELY
J.

DEFENDANT'S EXHIBIT NO. 1.

Relevant Portions of Record and Briefs in Case of National Biscuit Company v. Philadelphia, 374 Pa. 604.

Complaint in Equity.

(Exhibits Thereto Not Printed.)

The Complainant, National Biscuit Company, brings this Bill of Complaint against the City of Philadelphia, George S. Forde, Revenue Commissioner of the City of Philadelphia, and Walter Pytko, Commissioner of Licenses and Inspections of the City of Philadelphia, and complains and says:

1. Complainant, National Biscuit Company, is a foreign corporation organized under the laws of New Jersey and having its principal office at 449 West 14th Street, New York, New York. It is duly authorized to do business in the Commonwealth of Pennsylvania and has a factory and place of business in Philadelphia at 1215 W. Glenwood Avenue, Philadelphia, Pennsylvania. Complainant was, during the year 1952, and still is, engaged in the business of manufacture and sale of bakery products, both within and without the City of Philadelphia, and both within and without the Commonwealth of Pennsylvania, and in connection therewith is engaged in interstate commerce.

2. Defendant, City of Philadelphia, is a municipal corporation, created and existing under and pursuant

to the laws of the Commonwealth of Pennsylvania and is a city of the first class thereof.

3. Defendant, George S. Forde, resides at 421½ East Slocum Street, Philadelphia, Pennsylvania, is Revenue Commissioner of the City of Philadelphia, and, pursuant to the provisions of Section 3-101 of the Philadelphia Home Rule Charter (adopted April 17, 1951 pursuant to the authority of the Act of April 21, 1949, P. L. 665), is the head of the Department of Collections of the City of Philadelphia and is charged with the duty (personally, or by deputies or duly authorized agents or employees) of exercising the powers and performing the duties vested in and imposed upon the Department of Collections.

4. Defendant, Walter Pytko, resides at 4476 East Thompson Street, Philadelphia, Pennsylvania, is Commissioner of Licenses and Inspections of the City of Philadelphia, and, pursuant to the provisions of Section 3-101 of the said Philadelphia Home Rule Charter, is the head of the Department of Licenses and Inspections of the City of Philadelphia and is charged with the duty (personally, or by deputies or duly authorized agents or employees) of exercising the powers and performing the duties vested in and imposed upon the Department of Licenses and Inspections.

5. The City of Philadelphia, by Ordinance approved December 9, 1952, a copy of which is attached hereto and made part hereof, marked "Exhibit A", has attempted (Section 3) to impose a so-called Mercantile License Tax on your Complainant, for the year 1953 and annually thereafter, at the rate of three (3) mills on each dollar of the annual gross volume of

business transacted in Philadelphia during the year 1952 and annually thereafter, or, in the alternative, at the optional rates and on the optional basis therein more fully set forth; and also has attempted (Section 2) to require Complainant to pay a license fee of Three Dollars ($3.00) and to procure a mercantile license, beginning in the year 1953 and annually thereafter, for each of its places of business in said City.

6. Said Ordinance was passed pursuant to the purported authority of the Act of August 5, 1932, Extra Sessions P. L. 45, 53 P. S. Section 4613, known as the "Sterling Act", which provides, however, that the City of Philadelphia shall not have authority to levy, assess and collect "any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State Tax or license fee".

7. Complainant is subject to and pays annually to the Commonwealth of Pennsylvania a corporate net income tax under the Act of May 16, 1935, P. L. 208, as last reenacted and amended by the Act of December 27, 1951, P. L. 1746, 72 P. S. Section 3420 a-n. The last tax report filed by Complainant with the Commonwealth under this statute was for the year 1951, a copy of which is attached hereto and made part hereof, marked "Exhibit B". The tax shown to be due on said report, amounting to $110,095.20, was duly paid and the Commonwealth made a settlement of tax against Complainant in the amount so paid, as evidenced by its certificate of settlement, a copy of which is attached hereto and made part hereof, marked "Exhibit C". Said tax return for 1951 is representative of the Pennsylvania corporate net income tax report

that will be due and filed for 1952 and for subsequent years. It is estimated that the corporate net income tax payable to Pennsylvania for the year 1952 will be in excess of that paid for 1951.

8. Complainant is subject to and pays annually to the Commonwealth of Pennsylvania a franchise tax under the Act of June 1, 1889, P. L. 420, Sections 20 and 21, as last amended by the Acts of May 16, 1945, P. L. 606, Section 1, and of May 29, 1951, P. L. 462 Section 1, 72 P. S. Sections 1871, 1901 (see Sections 1871-1901). Under said statute Complainant duly filed a tax report for the year 1951 and paid to the Commonwealth of Pennsylvania for the year 1951 a tax amounting to $56,915.44 in accordance with said report. A copy of said tax report is attached hereto and made a part hereof marked "Exhibit D". The settlement of tax made against Complainant by the fiscal agents of the Commonwealth was in the amount of $56,854.40. A copy of the settlement certificate is attached hereto and made a part hereof marked "Exhibit E". Said tax return is representative of the Pennsylvania franchise tax reports of Complainant for subsequent years. Although not yet due, Complainant has filed its Pennsylvania franchise tax report for 1952, and has paid the tax shown thereon, amounting to $58,308.88, to the Commonwealth.

9. Complainant also pays to the School District of Philadelphia an annual tax on gross receipts as therein defined at the rate of one (1) mill, pursuant to the provisions of the Act of May 23, 1949, P. L. 1669, as amended by the Act of May 10, 1951, P. L. 265, and as further amended by the Act of September 29, 1951, P. L. 1629, 24 P. S. Section 584.1-584.12. On or before

May 15, 1952, as required by law, Complainant filed its tax return under said statutes for the year 1952, based upon gross receipts for 1951, and paid the tax therein reported, amounting to $3,282.63. A copy of said tax return is attached hereto and made a part hereof marked "Exhibit F". Said tax return is representative of the Philadelphia School District tax reports of Complainant for subsequent years.

10. Complainant is also subject to regulation by the Department of Agriculture of the Commonwealth under the Act of May 22, 1933, P. L. 912, as amended, 43 P. S. Sections 403-408, and is required under Section 3 thereof to pay a license fee to and obtain a license from the Department of Agriculture, annually, as a condition precedent to operating any bakery in the Commonwealth. Said license fees are graduated in amounts ranging from $5 to $20 for each bakery, based upon the number of barrels of flour used per week. During the year 1952 Complainant paid to the Commonwealth of Pennsylvania $185 in such license fees.

11. On the basis of its operations for 1952 and prior years, it is estimated that the mercantile license tax, which Defendants are attempting to impose upon Complainant for the year 1953, will amount to more than $10,000, computed at three mills on gross volume of business, which is more favorable to Complainant than the alternative methods of computation provided in the Ordinance.

12. Complainant is advised by counsel, believes, and therefore avers that, on the basis of the foregoing facts, the Ordinance and attempted imposition of a

mercantile license fee and tax upon Complainant by the City of Philadelphia, herein complained of, is contrary to law, null and void, and without legal effect, for the reasons, inter alia:

(1) That the aforesaid mercantile license fee and tax levy, as applied to Complainant, are not authorized by the Act of August 5, 1932, Ex. Sess. P. L. 45, 53 P. S. Section 4613, known as the Sterling Act; but, on the contrary, are prohibited by such statute, because, inter alia, Complainant is subject to and pays the State taxes and license fees above mentioned.

(2) That the said mercantile license fee and tax are also contrary to Section 18 (a) (8) (9) of the Act of April 21, 1949, P. L. 665, 53 P. S. Section 3421.18, known as the "First Class City Home Rule Act", in that the City is attempting to exercise powers contrary to, or in enlargement of, powers granted by Acts of the General Assembly which limit rates and fix subjects of taxation or provide for the assessment of real or personal property and persons for taxation purposes.

(3) That the said Ordinance violates Section 2-201 of the Philadelphia Home Rule Charter, adopted by the Electors on April 17, 1951, pursuant to the First Class City Home Rule Act, April 21, 1949, P. L. 665, Section 17, 53 P. S. Section 3421.17, which Section provides that every ordinance, except annual budget ordinances and general codifications and revisions of City ordinances, shall contain not more than one subject which shall be clearly and adequately expressed in its title.

(4) That the said Ordinance, herein complained of, is so vague, uncertain, inconsistent and incomplete in its provisions, and the application thereof to Complainant would be so arbitrary and unreasonable, that it cannot be enforced against Complainant; and that any attempt to enforce the same against Complainant would violate the due process clauses of the Pennsylvania Constitution (Art. I, Secs. 9, 10, 11) and of the Federal Constitution (Fourteenth Amend. Sec. 1); the uniformity clause of the Pennsylvania Constitution (Art. IX, Sec. 1); the equal protection clause of the Federal Constitution (Fourteenth Amend. Sec. 1); and the commerce clause of the Federal Constitution (Art. I, Sec. 8, subsec. 3).

13. Notwithstanding the foregoing, Complainant is advised by counsel, believes and therefore avers that the Law Department of the City of Philadelphia, although requested, has refused to issue any ruling that a corporation is not subject to the said City mercantile license tax if it pays any or all of the aforesaid State taxes, or that any business paying State license fees is not taxable under the said Ordinance. The Regulations adopted thereunder recognize certain grounds for not applying the tax, but not those set forth in this Complaint (Sec. 303 (b)). Defendants are threatening to enforce the said Ordinance against, and to collect the said mercantile license tax and fee from, your Complainant.

14. Under the Ordinance herein complained of, your Complainant will be subject to severe penalties and interest payments at the rate of 18% per annum for non-compliance therewith, its right of refund under

the Ordinance in case of erroneous payment is not clearly expressed or provided, and the determination of legal questions involved will require a multiplicity of suits, at common law, unless equity will take jurisdiction over the case on its merits. Your Complainant is advised by counsel, believes, and therefore avers, that it does not have an adequate remedy at law.

WHEREFORE, your Complainant prays this Honorable Court (a) to take jurisdiction of this suit; (b) to declare the aforesaid Ordinance herein complained of to be inapplicable, null and void, insofar as your Complainant is concerned; (c) to enjoin and restrain the Defendants above named and all other officers and agents of the City of Philadelphia from taking any further action to assess or collect the tax from your Complainant under the provisions of the aforesaid Ordinance; and (d) to grant such other and further relief as may be just and equitable.

/s/ LESLIE M. SWOPE,
Leslie M. Swope.
/s/ CHARLES J. BIDDLE,
Charles J. Biddle.
DRINKER BIDDLE & REATH
117 South 17th Street
Philadelphia 3, Pa.
Attorneys for Complainant.

Defendants' Answer.

1-4. Admitted.

5. Exhibit "A" is admitted.

6. The provisions of the Sterling Act of August 5, 1932, P. L. 45 speak for themselves, but have no application to the power of the City to impose taxes similar to the City Mercantile License Taxes.

7. Defendants admit plaintiff pays the State Corporate Net Income, but the amount is immaterial.

8. Defendants admit plaintiff pays the State Franchise Tax but the amount is immaterial.

9. No answer required as same is immaterial.

10. The Act of May 5, 1933 P. L. 912 as amended, 43 P. S. 403-408 speaks for itself. The total amount paid by plaintiff is immaterial.

11. Defendants have no knowledge, and demand proof. This averment is immaterial.

12. Denied.

13. Admitted that the Law Department considers plaintiff subject to the provisions of the City Mercantile License Tax Ordinance.

14. Defendants admit that the Court has jurisdiction to hear and determine the subject matter of the Complaint, but deny that plaintiff is entitled to the relief prayed for.

/s/ ABRAHAM WERNICK
Abraham Wernick
Deputy City Solicitor
ABRAHAM L. FREEDMAN
City Solicitor
Attorneys for Defendants.

Philadelphia Ordinance Approved by Mayor December 9, 1952.

AN ORDINANCE

To provide revenue by imposing a mercantile license tax on persons engaging in certain businesses, including manufacturing, professions, occupations, trades, vocations, and commercial activities in the City of Philadelphia; providing for its levy and collection; providing for the issuance of mercantile licenses, conferring and imposing powers and duties on the Department of Collections and on the Department of Licenses and Inspections; and imposing penalties.

The Council of the City of Philadelphia hereby ordains:

SECTION 1. Definitions.

(a) "Person" means any individual, partnership, association, or corporation. Whenever used in any clause prescribing or imposing a penalty, the term "Person" as applied to associations shall mean the partners or members thereof, and as applied to corporations, the officers thereof.

(b) "Wholesale Dealer" or "Wholesale Vendor" means any persons who sells to dealers in, or vendors of, goods, wares and merchandise.

(c) "Retail Dealer" or "Retail Vendor" means any person who is a dealer in or vendor of goods, wares, and merchandise who is not a wholesale dealer or vendor.

(d) "Manufacturer" means any person who sells goods, wares and merchandise of his own growth, or production.

(e) "Business" means the carrying on or exercising for gain or profit within the City of Philadelphia of any trade, business, profession, vocation, or making sales to persons within the City of Philadelphia, or of any manufacturing, commercial or financial activity, service or business, including but not limited to manufacturers, brokers, wholesale dealers or wholesale vendors, retail dealers or retail vendors.

"Business" shall not include the following: Any business conducted by a non-profit corporation or association organized for religious, charitable or educational purposes; or any authority created and organized under and pursuant to any Act of Assembly; the business of any insurance company, association or exchange, or any fraternal, benefit, or beneficial society of any other state under the laws of which insurance companies, associations or exchanges, or fraternal, benefit, or beneficial societies of this Commonwealth doing business in such other state would be subjected by reason of the tax imposed by this Ordinance to additional or further taxes, fines, penalties or license fees by such other state; and any employment for a wage or salary.

(f) "Financial Business" means the services and transactions of private banks and bankers, building and loan associations, savings and loan associations, credit unions, savings banks, banks, bank and trust companies, trust companies, investment companies registered as such with the Federal Securities and Exchange Commission, holding companies, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors and commission merchants.

(g) "License year" means the twelve-month period corresponding to the fiscal year of the City.

(h) "Gross Volume of Business" means gross receipts and shall include both cash and credit transactions. It shall exclude:

(1) the dollar volume of annual business covering the resale of goods, wares or merchandise taken by a dealer as a trade-in or as part payment for other goods, wares and merchandise in the usual and ordinary course of his business, except to the extent that the resale price exceeds the trade-in allowance;

(2) in the case of a financial business, the cost of securities and other similar property sold, exchanged, paid at maturity, or redeemed, and moneys or credits received in repayment of advances, credits and loans, but not to exceed the principal amount of such advances, credits and loans and shall exclude deposits;

(3) the receipts or the portion thereof attributable to any item of sale involving the bona fide delivery of goods, commodities, wares or merchandise to a location regularly maintained by the other party to the transaction outside the limits of the City of Philadelphia and not for the purpose of evading payment of the tax or any portion thereof imposed under this ordinance.

For the purpose of determining the gross volume of business from the business of insurance, such receipts shall mean those from premiums received from risks within the City of Philadelphia, whether by mutual or stock companies, domestic or foreign, without any deductions therefrom for any cost or expense whatsoever.

(i) "Temporary, seasonal or itinerant business" means any business that is conducted for less than sixty (60) consecutive calendar days in any one calendar year.

SECTION 2. Licenses. Beginning in the year 1953, and annually thereafter, every person desiring to engage in or to continue to engage in any business shall, on or before the first day of January in each license year, or prior to the first day of business in any such license year, procure a mercantile license for each of his places of business in the City, from the Department of Licenses and Inspections which shall issue the same upon payment of a fee of three (3) dollars for each place of business in the City. Such license shall be conspicuously posted at each place of business of every such person at all times.

SECTION 3. Imposition and Rate of Tax. Every person engaging in any of the following businesses in the City shall, in addition to paying a license fee, as herein provided, pay an annual mercantile license tax for the license year 1953 and annually thereafter at the rate set forth:

(a) (1) A wholesale dealer or wholesale vendor at the rate of three (3) mills on each dollar of the volume of the annual gross volume of business transacted by such person, or,

(2) In the alternative, at the option of the wholesale dealer or wholesale vendor at the rate of three (3) per centum of the annual gross volume of business transacted by such person less the cost of goods and less the cost of labor.

(b) (1) A dealer or vendor who sells both at wholesale and retail at the rate of three (3) mills on each dollar of the annual gross volume of

wholesale business transacted by such person and three (3) mills on each dollar of the volume of the annual gross volume of retail business transacted by such person, or,

(2) In the alternative, at the option of the dealer or vendor who sells both at wholesale and retail at the rate of three (3) per centum of the annual gross volume of wholesale business transacted by such person less the cost of goods and less the cost of labor and at the rate of three (3) mills on each dollar of the annual gross volume of retail business transacted by such person.

(c) (1) A manufacturer at the rate of three (3) mills on each dollar of the annual gross volume of business transacted by such person, or,

(2) In the alternative, at the option of the manufacturer at the rate of two (2) per centum of the annual gross volume of business transacted by such person less the cost of goods and less the cost of labor.

(d) (1) A manufacturer who sells also at retail at the rate of three (3) mills on each dollar of the annual gross volume of wholesale business transacted by such person and three (3) mills on each dollar of the annual volume of gross retail business transacted by such person, or,

(2) In the alternative at the option of the manufacturer who sells also at retail at the rate of two (2) per centum of the annual volume of gross wholesale business transacted by him, less the cost of good and less the cost of labor, and at the rate of three (3) mills on each dollar of the annual volume of gross retail business transacted by such person.

(e) All other persons engaged in business at the rate of three (3) mills on each dollar of the annual gross volume of business transacted.

SECTION 4. Computation of Volume of Business.

(a) Every person subject to the payment of the tax hereby imposed who has commenced his business at least one (1) full year prior to the beginning of any license year shall compute his annual gross volume of business upon the actual gross amount of business transacted by him during the preceding year.

(b) Every person subject to the payment of the tax hereby imposed, who has commenced his business less than one (1) full year prior to the beginning of any license year, shall compute his annual gross volume of business for such license year upon the gross volume of business transacted by him prior to such license year divided by the number of months in business during such prior year and multiplied by twelve.

(c) Every person subject to the payment of the tax hereby imposed, who shall commence his business subsequent to the beginning of any license year, shall compute his annual gross volume of business for that license year upon the gross volume of business transacted by him from the time of commencing business until the first day of December of that license year, divided by the number of months in business during such period and multiplied by the number of months between the time of commencing business and the end of that license year.

(d) Every person subject to the payment of the tax hereby imposed who engages in a tempo-

rary, seasonal or itinerant business shall compute his annual gross volume of business upon the actual gross volume of business transacted by him during such license year.

SECTION 5. Returns.

(a) Every return shall be made upon a form furnished by the Department of Collections.

(b) Every person subject to the tax imposed by this ordinance who has commenced his business at least one (1) full year prior to the beginning of any license year shall on or before the fifteenth day of March following file with the Department of Collections a return setting forth his name, his business and business address, and such other information as may be necessary in arriving at the annual gross volume of business transacted by him during the preceding year and the amount of the tax due.

(c) Every person subject to the tax imposed by this ordinance who has commenced his business less than one (1) full year prior to the beginning of any license year shall on or before the fifteenth day of March following, file with the Department of Collections a return setting forth his name, his business, business address, and such other information as may be necessary in arriving at the annual gross volume of business transacted by him during such period and the amount of tax due.

(d) Every person subject to the tax imposed by this ordinance who shall commence business subsequent to the beginning of any license year shall, on or before the tenth day of December of such license year, file a return with the Depart-

ment of Collections setting forth his name, his business, and business address, and such information as may be necessary in arriving at the annual gross volume of business transacted by him during such period and the amount of the tax due.

(e) Every person subject to the payment of the tax imposed by this ordinance who engages in a temporary, seasonal or itinerant business shall, within seven (7) days from the day he completes such business during any license year, file a return with the Department of Collections setting forth his name, his business, and business address, and such information as may be necessary in arriving at the actual gross volume of business transacted by him during such period and the amount of the tax due.

SECTION 6. Payment. At the time of filing the return the person making the same shall pay to the Department of Collections the amount of tax shown as due thereon.

SECTION 7. Powers and Duties of Department of Collections.

(a) It shall be the duty of the Department of Collections to collect and receive the taxes, interest, fines and penalties imposed by this ordinance. It shall keep a record showing the amount received from each person paying the tax, interest, fine and penalty and the date of such receipt.

(b) The Department of Collections is hereby charged with the administration and enforcement of the provisions of this ordinance, and is hereby empowered to prescribe, adopt, promulgate and enforce regulations relating to any matter pertaining to the administration and enforcement of this

ordinance, including provision for the re-examination and correction of returns, and payments alleged or found to be incorrect, or as to which an over-payment is claimed, or found to have occurred.

(c) The Department of Collections is hereby authorized to examine the books, papers and records of any person in order to verify the accuracy of any return made, or, if no return has been made, to ascertain the tax due. Every such person is hereby directed and required to give to the Department of Collections the means, facilities and opportunity for such examinations and investigations as are hereby authorized.

SECTION 8. Suit on Collections; Penalty.

(a) The City of Philadelphia may sue for the recovery of taxes, interest, fines and penalties due and unpaid under this ordinance.

(b) If for any reason the tax is not paid when due in each year, interest at the rate of six (6) per centum per annum on the amount of said tax, and in addition a penalty of one (1) per centum of the amount of the unpaid tax for each month or fraction thereof during which the tax remains unpaid shall be added and collected. Where suit is brought for the recovery of any such tax, the person liable therefor, shall, in addition, be liable for the costs of collection and the interest and penalties herein imposed.

SECTION 9. Fine and Penalties. Whoever makes any false or untrue statement on his return, or who refuses to permit inspection of the books, records or accounts of any business in his custody or control, when the right to make such inspection by the Department

of Collections is requested, and whoever fails or refuses to file a return required by this ordinance, and whoever fails or refuses to procure a mercantile license when so required under this ordinance, or fails to keep his license conspicuously posted at his place of business as required herein, shall, upon conviction before any magistrate, be sentenced to pay a fine of not more than three hundred (300) dollars for each offense, and in default of payment of said fine shall be imprisoned for a period of not more than ninety (90) days for each offense.

SECTION 10. Other Taxes. It is hereby declared to be the intention of the Council that the tax imposed under this ordinance shall be in addition to any and all other taxes imposed by the City of Philadelphia.

SECTION 11. Saving Clause.

(a) Nothing contained in this ordinance shall be construed to empower the City to levy or collect the tax hereby imposed on any person, or any business, or any portion of any business not within the taxing power of the City under the Constitution of the United States or the Constitution or laws of the Commonwealth of Pennsylvania.

(b) If for any reason any or all of the alternative methods of computing the tax provided for in Section 3(a) (2) or 3(b) (2) or 3(c) (2) or 3(d) (2) be declared invalid, then it is hereby declared to be the intention of the Council that such invalidity shall not impair the validity of Section 3(a) (1) or 3(b) (1) or 3(c) (1) or 3(d) (1) and that Section 3(a) (1), 3(b) (1), 3(c) (1), 3(d) (1) and all other sections of this ordinance shall remain in full force and effect as if the invalid section or sections had not been adopted.

(c) If the tax, or any portion thereof, imposed by this ordinance shall be held by any court of competent jurisdiction to be in violation of the Constitution of the United States or of the Constitution or laws of the Commonwealth of Pennsylvania, as applied to any person, the decision of the court shall not affect or impair the right to impose the tax, or the validity of the tax so imposed upon other persons as herein provided.

Relevant Part of Sterling Act.

Section 1 of Act of August 5, 1952 Ex. Sess., P. L. 45, 53 P. S. 4613:

"Section 1. Be it enacted, &c., That from and after the effective date of this act, the council of any city of the first or second class shall have the authority by ordinance, for general revenue purposes, to levy, assess and collect, or provide for the levying, assessment and collection of, such taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of such city of the first or second class, as it shall determine, except that such council shall not have authority to levy, assess and collect, or provide for the levying, assessment and collection of, any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee. If, subsequent to the passage of any ordinance under the authority of this act, the General Assembly shall impose a tax or license fee on any privilege, transaction, subject or occupation, or on personal property, taxed by any city of the first or second class hereunder, the act of Assembly imposing the State tax thereon shall automatically vacate the city ordinance passed under the authority of this act as to all taxes accruing subsequent to the effective date of the act imposing the State tax or license fee." • • •

Relevant Excerpts From Appellee's Brief in Supreme Court of Pennsylvania (374 Pa. 604)

I. Counter-Statement of Questions Involved.

* * *

2. Can the Mercantile License Tax Ordinance be legally enforced against the several Appellees, under the Sterling Act, in view of the fact that they are subject to one or more of the following taxes imposed by the Commonwealth—tax on net earnings, corporate net income tax, foreign franchise tax, and the capital stock tax?

Negatived by the court below.

II. Counter-History of the Case.

(a) *Form of Action and Pleadings.*

All of the above cases are actions in equity to restrain the City of Philadelphia and certain officials thereof from enforcing the Philadelphia mercantile license tax ordinance approved December 9, 1952, against the respective Complainants. The cases were entered to the dockets of other courts, but were duly transferred to the Court of Common Pleas No. 2 for purposes of a consolidated hearing. This was considered desirable by all parties, because the several cases presented various aspects of the question whether the ordinance is valid. The ordinance was amended on March 9, 1953, and again on April 13, 1953, so as to extend the time for taking out the license or paying the tax for the year 1953, but the amendments are immaterial to the questions raised in this case.

There is no dispute about the facts. The Defendants duly filed Answers, admitting some facts set forth in the Complaint and demanding proof of others. A Stipulation was filed, in each case, setting forth additional facts agreed upon, subject to the objection of the Defendants in some instances that such facts are irrelevant and immaterial. (17a, 42a, 67a).

The cases were heard upon the Complaints and Answers thereto, and the Stipulations of additional facts; and also upon a Stipulation in each case (approved by the Court) as to the procedure, the effect of which was to treat the Court's adjudication as its final decree for purposes of appeal (75a).

The hearing was held before the court en banc on March 24, 1953, Judges Edwin O. Lewis and Vincent A. Carroll being present (President Judge Gordon was absent because of illness). The court handed down its decree on April 14, 1953 in favor of Complainants and enjoining Defendants from enforcing the provisions of the Ordinance against Complainants, to be followed by an opinion, which issued on April 17, 1953. Defendants thereupon took these appeals to this Court.

(b) *Summary of the Facts.*

* * *

THE NATIONAL BISCUIT COMPANY CASE.

National Biscuit Company is a foreign corporation engaged in the business of manufacture and sale of bakery products, both within and without the Commonwealth of Pennsylvania, and is engaged in interstate commerce in connection therewith (4a, 16a). It is subject to and pays annually to the Commonwealth of Pennsylvania a corporate net income tax which, for the year 1951, amounted to $110,095.20 (6a, 16a). It is also subject to and pays annually to the Commonwealth

a franchise tax which, for the year 1951, amounted to $56,854.40 (6a, 16a).

The company is subject to regulation by the Department of Agriculture under the statutes of Pennsylvania and is required thereunder to pay a license fee and obtain a license from the Department of Agriculture annually as a condition precedent to operating any bakery in the Commonwealth. These license fees are graduated in amounts ranging from $5 to $20 for each bakery based upon the number of barrels of flour used per week (7a, 16a, S 128a). During the year 1952 the company paid to the Commonwealth of Pennsylvania $185 in such license fees for the privilege of doing business during 1953 (7a, 16a).

III. Argument.

* * *

2. *The Mercantile License Tax Ordinance Cannot Be Enforced Against Appellees Because They Pay Either a Tax on Net Earnings or the Corporate Net Income and the Franchise or Capital Stock Tax, to the Commonwealth.*
(Pars. 1 and 3 of each Statement under Rule 22.)

(a) *The underlying purpose of the tax limitation in the Sterling Act was to protect the Commonwealth's sources of revenue; and the question whether the City has encroached upon the Commonwealth's preserve must be determined on the basis of substance and fact, and not according to refined technicalities.*

The Sterling Act is therefore the source of the City's power to tax, insofar as this case is concerned. The *power to tax so given must be strictly construed and not extended by implication. Murray v. Philadel-*

phia,[1] 364 Pa. 157, 163 (1950), and cases therein cited. The Sterling Act allows the City of Philadelphia to tax "persons, transactions, occupations, privileges, subjects and personal property within the limits of such City" and then expressly limits that power by providing that the City shall not have authority to levy "any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a *State tax* or license fee."

The purpose of this limitation is not left in doubt. The statute expressly provides in Section 1:

> ". . . It is the intention of this section to confer upon cities of the first and second classes the power to levy, assess and collect taxes upon any and all subjects of taxation which the Commonwealth has power to tax but which it does not now tax or license, subject only to the foregoing provision that any tax upon a subject which the Commonwealth may hereafter tax or license shall automatically terminate upon the effective date of the State act imposing the new tax or license fee."

In *Sley System Garages v. Philadelphia,* 135 Pa. Super. 440 (1939), the Superior Court said, with respect to the limitations contained in the Sterling Act that (p. 448):

> ". . . We assume also that the legislature showed by the proviso that it was interested in preserving to the state the sources of taxes already drawn upon and did not wish the city to take such income from it."

---

1. After quoting "it is a principle universally declared and admitted that municipal corporations can levy no taxes—unless the power is plainly and unmistakably conferred" from Dillon on Municipal Corporations, Justice Linn said that "the grant of such right is to be strictly construed, and not extended by implication" (p. 163).

Likewise, in *Pittsburgh Milk Co. v. Pittsburgh*, 360 Pa. 360, 363-4 (1948), Mr. Justice Drew, in speaking of the similar Enabling Act 481 of June 25, 1947, P. L. 1145, 53 P. S. 2015.1, said:

> "Act 481 of 1947 was designed for the financial relief of local municipalities. It broadened the tax base for Pittsburgh but at the same time it did impose a limitation on the City's right to tax. *The State reserved to itself the right to select its own subjects of taxation and provided that the City may not invade those tax fields necessary for the maintenance of the State government. . . .*" (Emphasis supplied.)

The same thing was said of Act No. 481 of 1947 by the Common Pleas Court of Erie County, in *In re Erie Gross Receipts Tax*, 73 D. & C. 313 (1950), at p. 314:

> "While the Act of June 25, 1947, authorizes municipalities to levy a tax in certain instances, it withholds from municipalities the right to levy, assess and collect any tax on a privilege, transaction or subject which is now or hereafter becomes subject to a State tax or license fee. *It will thus be noted that the State carefully guards against any municipality tapping the sources of revenue considered necessary for State purposes. . . .*". (Emphasis supplied.)

It is therefore apparent, not only from the express legislative intent stated in the Sterling Act, but also from the above quoted statements of the courts, that the purpose of the limitations in the Sterling Act was to protect the state's sources of revenue. Where the city attempts to levy a tax which may infringe upon a state tax, the practical operation of the two taxes is controlling and the issue is not to be determined by

subtle refinements of terminology or nice technicalities.

In *Murray v. Philadelphia*, 364 Pa. 157 (1950), Mr. Justice Linn, speaking for the Court, said (p. 165):

> "The legislative prohibition 'that such council shall not have authority' to tax anything 'which is *now* or *may hereafter* become subject to a State tax or license fee' was intended to prevent double taxation of the same thing; in other words, *the city was instructed that it could not tax subjects taxed by the state. The right of the state was paramount.* . . .
>
> "In determining whether double taxation results, whether the city tax conflicts with that imposed by the State, *the practical operation of the two taxes is controlling as against mere difference in terminology* from time to time employed in describing taxes in various cases. This is illustrated by *Arrott's Estate*, 322 Pa. 367, 185 A. 697 (1936). See also *Com. v. Union Trust Co.*, 345 Pa. 298, 307-8, 27 A. 2d 15 (1942)." (Emphasis supplied.)

(b) *Murray v. Phila., 364 Pa. 157 (1950) is controlling.*

The *Murray* case arose upon an attempt of the city, by an ordinance passed in December 1949, to extend the then existing city income tax to corporations and other subjects of taxation theretofore not taxed by the ordinance. The city attempted to impose a tax upon the net income of such corporations at the rate of 1¼%.

Murray contended that the city could not tax him on dividends received from corporations paying the Pennsylvania Corporate net income tax. The Court upheld his contention, saying (p. 169):

". . . The income, having been deducted from already taxed corporate property for purposes of distribution to the beneficial owners, is property which the Sterling Act prohibits the city from taxing. *In construing the Act, it is immaterial that state taxes have been referred to as excise or franchise taxes or by any other adjective; the reality controls.* The fact that this tax is paid to the state conclusively shows that the city has no jurisdiction to tax the corporate income. . . ." (Emphasis supplied.)

Murray further contended that the city could not tax him on dividends received from corporations paying the Pennsylvania capital stock tax or franchise tax. The Court also upheld this contention, saying (p. 168):

". . . When the corporation pays to its stockholders income out of the property on which the capital stock tax has been paid, the city may not again tax the income in the hands of the stockholder; and the reason is that the Sterling Act did not confer the power to tax the 'subject' that the state had taxed; on the contrary, tax was prohibited. . . . ."

Since this Court held that Murray could not be taxed on money distributed to him by a corporation that had already been taxed by the State, a fortiori the corporation itself which had been taxed by the State, cannot be taxed again on the same income. This Court expressly decided the latter point.

Sheridan Transportation Company, a foreign corporation, was a party plaintiff in the *Murray* case and contended that the city's net income tax could not be imposed upon it, because it paid the corporate net in-

come tax and also the franchise tax. This Court upheld its contention, saying (p. 174):

> "Sheridan Transportation Company, plaintiff at number 144, is a corporation of the State of Delaware, with its principal office in the city of Philadelphia. It denies the power of the city to tax the income of corporations which are liable to taxation by Pennsylvania under the provisions of the foreign corporation franchise tax Act of June 1, 1889, P. L. 420, as amended, 72 PS 1871 (b) and the corporate net income tax Act of May 16, 1935, P. L. 208, as re-enacted and amended, 72 PS 3420 et seq. With respect to this plaintiff, the city says: 'The question directly involved is whether the said foreign corporation Franchise Tax is a tax on income, for it is quite obvious that if it is not a tax on income, then the amendatory ordinance of December 9, 1949, taxing net income derived from business in Philadelphia by foreign corporations is not a duplication of the foreign corporation Franchise Tax.' Earlier in this opinion, it was noted that the franchise tax was regarded as an equivalent of the capital stock tax and that, while considered an excise tax in some contexts, in others it was regarded as a tax on property. As the capital stock tax and the franchise tax are paid out of the corporate property, the income is not taxable by the city."

F. W. Hoffman Co. Inc., a Pennsylvania corporation, intervened in the Murray case and made the same argument, based upon its liability for the state income and capital stock taxes. The Court said (p. 174):

> "F. W. Hoffman Co. Inc., intervenor, a Pennsylvania Corporation with its principal office in Philadelphia, subject, like all domestic corpora-

tions, to the capital stock tax, also pays the corporate net income tax. For reasons stated earlier in this opinion, the city has no power to tax its income."

The Philadelphia Saving Fund Society and the other three saving funds, which are Complainants in the present suit, were also allowed to intervene in the *Murray* case. They contended that the city could not impose a tax upon their net income under the Sterling Act because they were subject to a state tax of 3% on their net earnings under the Act of June 1, 1889 P. L. 420, sec. 27, as amended, 72 P. S. § 2241.* This Court agreed, saying pp. 174-175:

"The intervening saving fund societies, the Philadelphia Saving Fund Society, the Western Saving Fund Society of Philadelphia, The Beneficial Saving Fund Society of Philadelphia and Saving Fund Society of Germantown and its Vicinity, deny the power to tax their respective incomes and support their position by reference to the Act of June 1, 1889, P. L. 420, sec. 27, as amended by Act of May 23, 1945, P. L. 910, sec. 1, 72 PS 2241. This Act provides that these parties shall annually, 'make report to the Department of Revenue setting forth the entire amount of net earnings or income received by said company . . . from all sources during the preceding year . . . ; and upon such net earnings or income, the said company . . . shall pay into the State Treasury, through the Department of Revenue, for the use of the Commonwealth, . . . three per centum upon such annual net earnings or income . . .' The city's proposed tax is 'on the net profits earned after January 1, 1949, on

* This taxing act is still in effect.

businesses, professions, or other activities conducted by such residents' (which includes corporations); the term 'net profits' is defined as 'net gain from the operation of a business . . . after provision for all costs and expenses incurred in the conduct thereof . . .' If these interveners are taxable pursuant to the amended ordinance, they will be required by the statute to pay 3% to the state and by the ordinance to pay 1¼% to the city on precisely the same report or return; a copy of one of these reports was filed with the court. The state tax is on net earnings which fact prevents the city from also taxing the net earnings. See generally, *Blauner's Inc. v. Phila.*, 330 Pa. 342, 198 A. 889 (1938); *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940); *Federal Drug Co. v. Pittsburgh*, 358 Pa. 454, 57 A. 2d 849 (1948); *Lawrence Twp. School District Case*, 362 Pa. 377, 67 A. 2d 372 (1949)."

* * *

Application to National Biscuit Company Case.

The same situation applies to this corporation, which also pays the state corporate net income tax, the only difference being that it is a manufacturing company and not a "financial business". The tax imposed by the city ordinance is therefore computed either upon the basis of the company's annual gross volume of business at 3 mills or, at its option, at 2% of its annual gross volume of business less the cost of goods and less the cost of labor—in effect, gross income. See Ordinance Sec. 3(c)(d).

Here again the tax is upon a more onerous basis than a tax upon net income, since it is based either upon gross income or upon gross receipts without any deductions whatsoever. Therefore, the city tax of

necessity directly reduces the net income subject to state tax and correspondingly the state tax itself.

Other state taxes paid.

Household also pays the Pennsylvania foreign franchise tax based upon capital stock. For 1951 the tax amounted to $30,014.84 and will be in excess thereof for 1952 (29a, 41a). Consumer Discount pays the capital stock tax which amounted to $6,250.00 for 1951 and will probably be greater for 1952 (30a, 41a). National Biscuit Company pays the foreign franchise tax. For 1951 the tax amounted to $56,915.14 and for 1952 was $58,308.88 (6a-7a, 14a, 16a). These taxes are all imposed under the Act of June 1, 1889 P. L. 420, §§ 20 and 21, as amended, 72 P. S. §§ 1871, 1901. Throughout the *Murray* case the Court held that a tax on income is a tax on the property producing the income and the franchise or capital stock tax is likewise a tax on such property, so that the city could not impose a net income tax thereon. A fortiori, the city cannot now impose a tax on the gross income from such property or the gross receipts from use of its capital.

(c) *Earlier decisions are distinguishable or are overruled by the Murray case.*

The city relies upon the following earlier cases: *Blauners', Inc. v. Philadelphia,* 330 Pa. 342 (1938); *Philadelphia v. Samuels,* 338 Pa. 321 (1940); and *Federal Drug Co. v. Pittsburgh,* 358 Pa. 454 (1948).

The *Blauner* case held that a city sales tax did not duplicate the state corporate net income tax because (a) the former was a tax on "transactions" whereas the latter is a tax on "property"; and (b) the sales tax was imposed upon the "purchaser or consumer" whereas the net income tax is on the "corporation re-

ceiving the income" (pp. 345-6). For the same reasons, the Court also held that the city sales tax did not invade the field preempted by the state capital stock tax.

The *Samuels* case held that the city parking lot tax did not duplicate the corporate net income tax for the reason that the parking lot tax was (a) a tax upon specific "transactions" and (b) an excise tax, whereas the state *corporate net income tax* is a "property tax". Mr. Justice Linn said, at p. 326, "This court is committed to the view that the corporate net income tax is a property tax. The tax imposed by the ordinance is an excise tax and therefore cannot be in conflict with the state act taxing property." The Court also distinguished the state capital stock tax on the same ground (p. 325).

The *Federal Drug* case held that a Pittsburgh gross receipts tax on vendors of merchandise did not encroach upon the state corporate net income tax because "this contention is disposed of by our decisions in" the *Blauner* and *Samuels* cases (p. 456). The argument that the gross receipts tax duplicated the state foreign franchise (capital stock) tax was similarly disposed of (p. 457).

It is now clear that those three cases were decided upon distinctions that are not valid in the present case:

(1) *Property Tax.*

Whether the city mercantile license tax and the state corporate net income tax, foreign franchise tax and capital stock tax are excise taxes or not, the fact remains that they are all taxes on property.

For years it has been the law that the state tax on capital stock is a tax on the property of the corporation—*Murray* decision p. 166 and cases cited.

Insofar as the issues involved in this case are concerned, the state foreign franchise tax was devised to reach the property of foreign corporations as the equivalent of the capital stock tax and stands in the same category—*Murray* decision, p. 170.

Whether the corporate net income tax be regarded as a property tax or an excise tax "the tax imposed was *upon property*"—*Murray* decision, p. 169.

It is interesting to note why this Court held that the corporate net income tax is a tax upon property. The reason advanced was that "a tax on income is a tax on the property producing the income"—*Murray* decision, p. 168, where this Court said:

> ". . . In *Kelley v. Kalodner*, 320 Pa. 180, 181 A. 598 (1935), it was decided after mature consideration of divergent views, that a tax on income is a tax on the property producing the income. It is immaterial, in construing the Sterling Act, that the income has been transferred from the corporation to its beneficially interested stockholders. Chief Justice Frazer said, in *Kelley v. Kalodner*, at pp. 186-187, '. . . . we are inevitably impelled to the conclusion that an income tax is a property tax. This result seems particularly clear in so far as a tax upon the income from real and personal property is concerned."

Applying this reasoning, it is equally true that the Philadelphia mercantile license tax is a tax on property. In the case of the saving fund societies, it is a tax upon the gross income received from investments. In the case of Household Finance Corporation and Household Consumers Discount Company, it is a tax upon the gross income received from loans of capital. In the case of the National Biscuit Company, it is a tax upon the gross receipts from the use of cap-

ital or, under the optional alternative computation, on the gross income from the use of capital. In all these cases, therefore, the city is attempting to impose a tax upon income produced by property and under the test of the *Murray* decision the city tax is likewise a tax on property.

(2) *Excise Tax.*

There are other decisions which hold that the tax on the net earnings of savings banks, the state corporate net income tax, the state foreign franchise tax and a mercantile license tax are all excise taxes.

The tax on net earnings of savings banks was held to be a franchise or excise tax in *Philadelphia Contributionship for Insurance, etc. v. Commonwealth*, 98 Pa. 48 (1881) and *The Philadelphia Saving Fund Society v. The Lehigh Coal & Navigation Co.*, 163 Pa. Super. 106 (1948).

The state corporate net income tax was held to be an excise tax in *Commonwealth v. Warner Bros.*, 345 Pa. 270 (1942), *Commonwealth v. Electrolux Corp.*, 362 Pa. 333 (1949), *Commonwealth v. Bayuk Cigars Co.*, 345 Pa. 348 (1942), *Commonwealth v. Curtis Publishing Co.*, 363 Pa. 299 (1949), to which may be added numerous decisions of the Dauphin County Court. In the *Warner Bros.* case, for example, this Court said, at pp. 271-72:

> "At the outset, it is to be observed that we are not considering an income tax, *but an excise tax for the privilege of doing business in the Commonwealth, based upon net income as returned to and ascertained by the Federal Government.* When this situation is borne in mind, the doubts as to the legality of the tax suggested by appellant disappear." (Emphasis supplied.)

The state foreign franchise tax was held to be an excise tax in *Commonwealth v. Columbia Gas & Electric Corp.*, 336 Pa. 209, 217 (1939).

A mercantile license tax imposed by city ordinance was held to be an excise or privilege tax in *Rice Drug Co. v. Pittsburgh*, 360 Pa. 240, 242 (1948) and *Blauners', Inc. v. Philadelphia*, 330 Pa. 340, 346 (1938).

Therefore, no valid distinction can be drawn between the city tax and the several state taxes mentioned on the basis that one or another is an excise tax.

(3) *Whether a Property Tax or an Excise Tax Is Here Immaterial.*

As we have seen, in 1950 this Court's decision in the *Murray* case did away with many of the fine technical distinctions in the earlier cases and finally took the position that all of these taxes are property taxes. Thus, at p. 165 the Court said:

> ". . . whether the city tax conflicts with that imposed by the state, the practical operation of the two taxes is controlling as against mere difference in terminology from time to time employed in describing taxes in various cases.

Again, at p. 169, the Court said, with particular reference to the Sterling Act:

> ". . . In construing the Act, it is immaterial that State taxes have been referred to as excise or franchise taxes or by any other adjective; the reality controls."

But whether any of these taxes are called property taxes or excise taxes makes not the slightest difference in the present case. The fundamental fact remains that the Philadelphia merchantile license tax, the state tax on net earnings of the saving fund societies and the state corporate net income tax, are

taxes on precisely the same thing, the same "subject", namely, the income of the taxpayers. Call it what you will, whether property tax or excise tax, it is impossible to call it two different things in the same case at the same time just because one tax is on the gross and the other on the net income. It is still on the income—the only difference lies in the deductions which are permissible in arriving at the tax base. The city having been defeated in the *Murray* case in its attempt to tax the net figure at the bottom of the earnings statement, it is self-evident that it may not now escape the effect of the ruling in that case by moving up to the top of the same earnings statement and taking the gross income before expenses as its tax base in order to impose a still more onerous tax.[2]

* * *

IV. Conclusion.

For all of the reasons above set forth the ordinance of the City of Philadelphia of December 9, 1952, is invalid and appellees are not subject to the taxes and fees which it attempts to impose upon them. The decree of the Court below should therefore be affirmed.

Respectfully submitted,

LESLIE M. SWOPE,
CHARLES J. BIDDLE,
Attorneys for the Appellees.

---

2. Thus, in the *Murray* case, at p. 168, this Court applied this principle to a more remote situation than the case at bar, namely, to the City income tax on stockholders of Pennsylvania corporations as competing with the State tax on capital stock of such corporations, the Court saying:

> ". . . When the corporation pays to its stockholders income out of the property on which the capital stock tax has been paid, the city may not again tax the income in the hands of the stockholder; *and the reason is that the Sterling Act did not confer the power to tax the 'subject' that the state had taxed;* on the contrary, tax was prohibited. . . ." (Emphasis supplied.)

Appellee's Petition for Reargument (374 Pa. 604)

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

The majority opinion was handed down prior to and without benefit of the dissenting opinion of Justices Bell and Musmanno, which is so convincing and points up so clearly the public importance of this case that Appellee sincerely believes the Court should reconsider its decision and grant a reargument. Without repeating the cogent reasoning of the dissenting opinion, which is adopted as part of this petition, we point out the following additional considerations:

1. *The Majority Opinion necessarily amounts to a holding that the Pa. Corporate Net Income and Foreign Franchise Taxes are NOT Excise Taxes. This is contrary to the express language of the statutes and to prior decisions.*

The majority state, as the very foundation of their opinion, that the State corporate net income tax and the State foreign franchise tax "have been held, many times, to be property taxes", whereas the mercantile license tax is "an excise tax upon the privilege of transacting business" (5a).

This reasoning, necessarily amounts to a holding that the State corporate net income tax and foreign franchise tax are *not excise taxes.* Such a holding, however, flies in the teeth of the express language of the statutes and of many decisions of this Court and of the lower courts.

Section 3 of the Corporate Net Income Tax Act of May 16, 1935, P. L. 208, as last reenacted and amended, 72 P. S. 3420c, says:

"Section 3. Imposition of Tax—Every corporation shall be subject to and shall pay *for the*

privilege of doing business in this Commonwealth . . . a State excise tax at the rate of . . ." (Emphasis supplied.)

Section 21(b) of the Foreign Franchise Tax Act of June 1, 1889, P. L. 420, as amended, 72 P. S. 1871, reads:

"b. Every foreign corporation . . . shall be subject to and pay . . . a *franchise tax* at the rate of . . ." (Emphasis supplied.)

In *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa. 421, 428 (1936), Chief Justice Kephart, speaking of the corporate net income tax, said:

". . . the present act imposes a tax on a privilege measured by net income. . . ."

In *Commonwealth v. Warner Bros.*, 345 Pa. 270, 271 (1942), Mr. Justice Schaffer said, as to the same tax:

"At the outset, it is to be observed that we are not considering an income tax, *but an excise tax for the privilege of doing business in the Commonwealth* . . ." (Emphasis supplied.)

In *Commonwealth v. Bayuk Cigars, Inc.*, 345 Pa. 348, 350, 351 (1942), Mr. Justice Linn said:

"The Corporate Net Income Tax Act . . . provides for a State excise tax payable for the privilege of doing business in this Commonwealth. . . ."

In *Commonwealth v. Electrolux Corp.*, 362 Pa. 333, 336 (1949), this Court adopted the opinion of Judge Richards, who said:

"The tax here involved is not a tax on income, but an excise tax for the privilege of doing business in the Commonwealth, measured by net

income as returned to and ascertained by the Federal government. . . ."

In *Commonwealth v. Curtis Publishing Co.*, 363 Pa. 299, 312 (1949), Chief Justice Maxey said:

". . . In most of the decisions in which the nature of the corporate net income tax was directly involved, it has been held that this tax is an excise tax upon the privilege of doing business in Pennsylvania, measured by the net income. . . ."

As to the foreign franchise tax, this Court said in *Commonwealth v. Columbia Gas & Electric Corp.* 336 Pa. 209, 217 (1939), speaking through Chief Justice Kephart:

"Did the legislature intend to change its old policy of levying a property tax and create in its stead a franchise tax upon foreign corporations? We concur with the court below in its conclusion that the tax is a franchise tax and not a property tax. The legislature in the title to the act called it a franchise tax. . . ."

Mr. Justice Allen M. Stearne, in *Commonwealth v. Ford Motor Co.*, 350 Pa. 236, 238 (1944), speaking with reference to the foreign franchise tax, said:

"It will suffice (preliminarily) to state that *the Act imposes a franchise or excise tax upon foreign corporations authorized to do business in this Commonwealth*, in substitution for the property or ad valorem tax theretofore payable by such corporations. . . ." (Emphasis supplied.)

Likewise, in *Commonwealth v. Quaker Oats Co.*, 350 Pa. 253, 258 (1944), this Court disposed of the argument that the foreign franchise tax falls upon

exempt Federal, state and municipal securities by saying:

> ". . . the inclusion of these securities in the formula producing the tax base was proper. They, themselves, were not taxed."

In the face of this array of decisions and of foregoing quotations from the statutes themselves, how can the majority now hold that the State income and foreign franchise taxes are *not* excise taxes and therefore that the City tax is different because it is an excise tax?

In this case, we have taken the position that realities control and it makes no difference whether the said State taxes are excise taxes or property taxes or both, since they are measured by income, just like the City tax. Since the majority opinion has resurrected that distinction, however, it is clear that it is untenable, unless the majority opinion be considered as overruling all of the decisions above mentioned.

2. *The Majority Opinion amounts to judicial repeal of the Sterling Act insofar as its tax limitations are concerned.*

In *Murray v. Philadelphia*, 364 Pa. 157, 169 (1950), the Court, in a unanimous opinion, said: "In construing the [Sterling] Act it is immaterial that State taxes have been referred to as excise or franchise taxes or by any other adjective; the reality controls."

Yet this is exactly the error into which the majority now falls. Because the City Ordinance describes the tax as a "mercantile license tax", the majority accepted it as such and failed to look underneath the surface to discover the exact nature of the tax. As Mr. Justice Bell has so clearly demonstrated, however, the Ordinance attempts to impose an income tax upon corporations. Insofar as financial business

and manufacturers are concerned, the Ordinance attempts *by definition* to impose the tax upon gross income. In the case of financial business the cost of securities sold and the amount of loans made are deductible, Section 1(h)(2); and in the case of a manufacturer an optional tax is permitted on the basis of gross receipts less the cost of goods and less the cost of labor, Section 3(c)(2).

If reality controls, this Court must find upon reconsideration that the City tax upon corporate income (whether gross or net) infringes upon the State corporate income tax. Everything said on this point in the majority opinion could have been said as well in the *Murray* decision if the City had *called* the tax then under review a "mercantile license tax measured by net income." The *Murray* decision held that the City could not tax the net income of corporations, so it is inconceivable how this Court can now permit the City to tax the gross income of the same corporations, bearing in mind the purpose of the Sterling Act to protect the State's sources of revenue.

To illustrate:

A corporation has an earning statement substantially as follows:

(a) Gross receipts from all sources	$1,000,000.
(b) Less cost of goods sold, securities, loans, etc.	500,000.
(c) Gross income	500,000.
(d) Less other expenses	200,000.
(e) Net income	$ 300,000.

The State income tax is measured by (e) net income $300,000. The *Murray* case said that the City could not tax item (e) under the Sterling Act because

it would tap the State's sources of revenue. Yet the majority decision now says that the City may tax (c) gross income $500,000, which is a more onerous tax base than (e). If reality controls, this conclusion must be erroneous.

To all intents and purposes the tax limitation in the Sterling Act would, under the majority opinion, be a dead letter. Any tax apparently could be imposed by a municipality, under the Sterling Act or Tax Anything Act of 1947, by merely calling it a mercantile license tax, and excise tax, or anything else but a property tax. This means, of course, that the underlying purpose of the Sterling Act has been completely defeated and the Court has repealed the statute.

The result will be that the State's revenues will be seriously impaired. While this case was being litigated, the City officials repeatedly said that the City tax would produce about $12,000,000 a year from corporations. Since this is deductible on the State income tax returns, the State will lose at the rate of 5% on this amount or about $600,000 per annum. Similar statutes, if passed by the other municipalities and other governments under the Act of 1947 will entrench upon the State's revenues in even greater amounts. The Court will take judicial notice of the critical financial condition of the Commonwealth at the present time and the great difficulty which the legislature is having in enacting new revenue measures to meet the need. The record in this case also pointed out, most clearly, that the principal source of the State's Revenues at the present time consists of taxes upon corporations. (Supplemental Record 132a-134a, and see excerpt from the report of Governor Fine's Bipartisan Committee, printed as an appendix to Appellee's brief at p. 63.) The express purpose of the

Sterling Act was to preserve such revenues for the Commonwealth.

As matters presently stand, therefore, if the majority opinion holds, the tax limitations of the Sterling Act have been repealed judicially:

> 3. *The majority decision should be reconsidered because it unsettles the law of taxation in the Commonwealth and jeopardizes the collection of State taxes.*

The denial by the majority in this case that the State corporate net income tax and foreign franchise tax are excise taxes will, if allowed to prevail, seriously jeopardize the administration of these taxes in connection with multi-state corporations. In numerous cases, some of which are specifically mentioned above, this Court has been able to sustain the various State levies, and the Commonwealth has been able to reach out-of-state assets and income, solely on the ground that these taxes *are* excise taxes for the privilege of doing business in Pennsylvania, and are *not* property taxes.

Thus the constitutionality of the foreign franchise tax was sustainable in the *Columbia Gas* case, *supra,* only because the Court found that it was an excise tax. Likewise, the formula for bringing the value of capital stock located abroad into the Commonwealth for purposes of taxation was upheld, in the *Ford Motor* case, *supra,* only because it was held to be a franchise tax. And in the *Quaker Oats* case, *supra,* this Court could reach the result that exempt Federal, State and municipal securities held outside the State by the foreign corporation could be included in the tax base only by virtue of the fact that it found the foreign franchise tax to be an excise tax and not a property tax.

Similarly, the constitutionality of the corporate net income tax as applied to foreign corporations doing

business in Pennsylvania and the allocation fractions were sustained, in the *Turco Paint* case, *supra,* upon the ground that the corporate net income tax is an excise tax and therefore the allocation fractions operated as a fair measure of the value of the privilege exercised in Pennsylvania. In the *Warner Bros.* case, *supra,* this Court upheld the use of Federal net income as the tax base, particularly the Federal limitation of $2,000 on capital losses, on the ground that the corporate net income tax is an excise tax. The decision could not have been sustained if it were a property tax.

The authority of these and other cases that could be cited will be seriously open to question, both in this Court *and in the Supreme Court of the United States,* if the present opinion of the majority should stand and conclusively establish that the foreign franchise tax and the corporate net income tax are *not* excise taxes.

Indeed, the legislature was so convinced that the corporate net income tax is an excise tax and therefore could not be imposed upon foreign corporations engaged exclusively in interstate commerce under *Spector Motor Service, Inc. v. O'Connor,* 340 U. S. 602 (1950) that, in order to tax corporations doing purely interstate commerce business in Pennsylvania, it went to the trouble of imposing an entirely new corporate income tax which it specifically designated as a property tax.[1] Obviously, since the corporate net income tax of 1935 was called an excise tax and had been so held by this Court, it could not be applied to business

1. Act of August 24, 1951, P. L. 1417, as last reenacted and amended, 72 P. S. 3420 n-1. Section 3 of this Act (unlike the corresponding section of the Corporate Net Income Tax Act quoted above at p. 2) reads:

"Section 3. Imposition of Tax—Every corporation carrying on activities in this Commonwealth . . . shall pay *a State property tax* on net income derived from sources within this Commonwealth. . . . (Emphasis supplied.)

which was exclusively interstate commerce for it would then have been a charge for the privilege of carrying on interstate commerce which is prohibited by the Federal constitution. Therefore, to avoid this the legislature imposed a new corporate net income tax in 1951 applicable to foreign corporations, which it designated "a State property tax on net income derived from sources in this Commonwealth."

We submit that the whole intent of the decision in the *Murray* case was to abolish the type of technical distinction concerning nomenclature on which the opinion of the majority in this case is based. We further submit that the reason it was necessary to extinguish those distinctions was because, as time progressed, it became apparent that the distinctions were without substance and created an ambiguity in the Pennsylvania law of taxation which could lead only to confusion among the taxpayers of the Commonwealth. The present opinion at one and the same time revives the use of technical distinctions of nomenclature in deciding substantive questions concerning taxation and reinstates the confusion which previously existed and which had been cleared up effectively by the *Murray* case.

The method used by the majority in this case in order to arrive at its conclusion, i.e., the determination of substantive questions of State taxation according to their name rather than their substance, is an open invitation to the State legislature and the governing bodies of all its municipal subdivisions, to devise, with ever increasing ingenuity, novel levies in an effort to circumvent established constitutional principles limiting the power to tax. An immediate example of the type of tax which was invited by the majority opinion before the ink was scarcely dry upon it, is the proposal, now before the legislature at Harrisburg, which ap-

pears to be that if a tax is not levied upon income as such, but rather upon the income tax payments made to the Federal government the levy will be valid. This is a patent effort to justify a graduated income tax and thus circumvent the uniformity provisions of the Pennsylvania constitution and decision of this Court in *Kelley v. Kalodner*, 320 Pa. 180 (1935). We fear that the majority opinion will give great comfort to the sponsors of such proposals.

The fact that both Judges of the Common Pleas Court of Philadelphia and all of the Judges of the Common Pleas Court of Erie County, in their similar decision in *In Re Erie Gross Receipts Tax*, 73 D. & C. 313 (1950), and Justices Bell and Musmanno of this Court, all strongly believe that a local gross receipts tax cannot be imposed upon manufacturers subject to the State corporate net income tax and the franchise or capital stock tax, is sufficient to show that the majority opinion should be carefully reconsidered.

4. *The license fee point should also be reconsidered.*

On the basis of the reasoning of Justice Allen M. Stearne in his separate opinion dissenting in part, it is respectfully submitted that this Court should likewise permit a reargument of the licensee fee point as applied to this petitioner. The majority opinion concedes that the bakeries run by Appellee are carefully supervised and regulated by the Department of Agriculture. Nor does it deny that the license fees are imposed upon a graduated basis ranging from $5 to bakeries using less than 100 barrels of flour per week to $20 for bakeries using 200 barrels or more, and since this is imposed for each bakery operated by Appellee, its total license fees amounted to $180 last year.

The majority opinion dismissed this point lightly with the statement that "it is difficult to believe that

flat charges ranging from $5 to $20 per annum could have been legislatively intended to cover the cost of regulating the bakery industry" (p. 14a). This statement is palpably incorrect, because the license fees are *not flat charges* but are graduated similar to those in the *Pittsburg Milk Company* case.

As Mr. Justice Allen M. Stearne pointed out, "it is clear that $23,000 [the amount of such fees collected per annum recently] would pay for a great deal of regulation"; and we respectfully submit that he was correct in urging that this Court should not introduce "further uncertainty into this field of law by reaching a different result from that in the *Pittsburgh Milk* case, *supra*, by recognizing *a difference in degree of graduation* of the tax" (21a) (emphasis supplied).

Moreover, it is clear from the majority statement quoted above that they overlooked the actual fact that the graduated bakery fees were actually and historically fixed so as to pay for the cost of regulation. In Appellee's Supplemental Record at page 128a there is a copy of a letter from Mr. W. S. Hagar, who has been Deputy Secretary of Agriculture for many years and occupied this position at the time the fees were established, in which he said, in part:

> "When the present Bakery Law was being drafted in 1933, this Department estimated what it would cost to inspect the bakeries and to administer the law. It was realized that the cost would vary according to the size of the plant and the volume of the business. Upon this premise, a graduated license was adopted according to the volume of business computed upon the amount of flour or flour substitutes used.
>
> "A single registration fee was considered but was abandoned, as it was felt that the industry

should pay a license sufficient to cover the complete enforcement of the law and is one of the few industries where such a license is required to manufacture food products in Pennsylvania."

For the reasons stated above, it is respectfully requested that a reargument be granted Appellee by the Court.

JOHN AMES BALLARD,
LESLIE M. SWOPE,
CHARLES J. BIDDLE,
Attorneys for National Biscuit Company, Petitioner.

DEFENDANT'S EXHIBIT NO. 2.

Appeal and Specification of Objections, Printed as Item II at Page 3a, Supra.

DEFENDANT'S EXHIBIT NO. 3.

Bond on Appeal From Settlement of An Account by the Secretary of Revenue and the Auditor General Filed May 18, 1954 (Not Printed).

IV.

RELEVANT EXCERPTS FROM TAXING STATUTE.

Sections 20 and 21 of the Act of June 1, 1889 P. L. 420, 72 P. S. §§ 1871, 1901 and 1902, as amended to 1952:

Section 21, as last amended by the Act of May 29, 1951, P. L. 462:

"Section 21. * * * (b) Every foreign corporation, * * * from which a report is required under the twentieth section hereof, shall be subject to and pay * * * a franchise tax at the rate of five mills upon a taxable value to be determined in the following manner. The actual value of its whole capital stock of all kinds, including common, special, and preferred, shall be ascertained in the manner prescribed in the twentieth section of this act, and shall then be divided into three equal parts.

(1) Of one third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the value of the taxpayer's tangible property not actually and exclusively used in manufacturing, situated within the Commonwealth, and whose denominator is the value of all the taxpayer's tangible property wherever situated.

(2) Of another third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the expenditures of the taxpayer for wages, salaries, commissions, or other compensation to its employes not exclusively engaged in manufacturing in this Commonwealth and assignable

to this Commonwealth as hereinafter provided, and whose denominator is the total expenditures of the taxpayer for wages, salaries, commissions, or other compensation to all its employes.

(3) Of the remaining third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the amount of the taxpayer's gross receipts from business not strictly incident or appurtenant to manufacturing in this Commonwealth assignable to this Commonwealth as hereinafter provided, and whose denominator is the amount of the taxpayer's gross receipts from all its business.

The sum of the amounts, determined in accordance with the foregoing three rules, shall be the taxable value. * * *

The amount assignable to this Commonwealth of expenditures of the taxpayers for wages, salaries, commissions, or other compensation to its employes, shall be such expenditures for the taxable year as represent the wages, salaries, commissions, or other compensation of employes not chiefly situated at, connected with, or sent out from premises for the transaction of business maintained by the taxpayer outside the Commonwealth.

The amount of the taxpayer's gross receipts from business assignable to this Commonwealth shall be, (1) the amount of its gross receipts for the taxable year, except those negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business maintained by the taxpayer outside the Commonwealth, and except rents and royalties, and interest and dividends, (2) rentals or royalties from property situated or from the use of patents within this Commonwealth, and (3) dividends and interest, except

such dividends and interest attributable to the business conducted on premises maintained by the taxpayer outside the Commonwealth." * * *

* * *

"Notwithstanding the foregoing provisions of this subsection (b), the franchise tax of five mills imposed by subsection (b) on reports filed for the calendar years * * * one thousand nine hundred fifty-two, * * * shall apply to the taxation of corporations, limited partnerships and joint-stock associations organized for manufacturing purposes, excepting companies engaged in the distilling of liquors, without excluding from the numerators of the applicable fractions tangible property actually and exclusively used in manufacturing, compensation of employes exclusively engaged in manufacturing, and gross receipts from business strictly incident or appurtenant to manufacturing."

Sec. 20, as last amended by the Act of May 16, 1945, P. L. 606:

"Section 20. That hereafter, * * * it shall be the duty of every * * * corporation, * * * now or hereafter incorporated or organized by or under the law of any other State * * *, and doing business in and liable to taxation within this Commonwealth, * * * to make annually on or before the fifteenth day of March, for the calendar year next preceding, a report in writing to the Department of Revenue on a form or forms to be prescribed and furnished by it, setting forth, in addition to any other information required by the Department of Revenue:

First. The amount of its capital stock at the close of the year for which report is made, together with the highest selling price per share, and the average selling price thereof during said year.

Second. Its debt account.

Third. Its income account, together with the disposition of any net income, and its profit and loss statement.

Fourth. Its general balance sheet.

Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and value of the same; and the value of the property, if any, exempt from taxation.

Sixth. A valuation and appraisal, in the manner hereinafter provided, of the capital stock of the said corporation, * * * at its actual value in cash as it existed at the close of the year for which the report is made.

* * *

The affidavit of two of the officers of such corporation * * * shall state, in addition to any other averments required by the department, that, with fidelity and according to the best of their knowledge and belief, the affiants have estimated, valued and appraised, as shown in said report, the capital stock of the said corporation at its actual value in cash as it existed at the close of the year for which report is made; taking into consideration, first, the average which said stock sold for during the year; and second, the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dvidends, expended in betterments, or carried into the surplus or sinking fund; and third, the actual value indicated or measured by consideration of the intrinsic value of its tangible property and assets, and of the value of its good will and franchises and privileges, as indicated by the material results of their exercise, taking also into consideration the amount of its indebtedness, * * *"

V.

COMMONWEALTH'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Commonwealth of Pennsylvania by George W. Keitel, Deputy Attorney General, counsel for the Commonwealth, respectfully requests your Honorable Court to make the following Findings of Fact and Conclusions of Law:

I. Findings of Fact.

The Commonwealth respectfully requests the Court to make as Findings of Fact paragraphs 1, 2, 4, 5, 8, 10, 11(a), 12, 14, 15, 16 and 17 in the Stipulation of Facts agreed to between counsel for the respective parties in the above-entitled case.

II. Conclusions of Law.

1. The Pennsylvania Franchise Tax imposed on foreign corporations under Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184, and further amendatory acts, is an excise tax levied on the privilege of doing business in Pennsylvania.

2. The Franchise Tax settlement against defendant for the year 1952 was made by the Departments of Revenue and of the Auditor General pursuant to the express provisions of said Act of 1935 and its amendments.

3. The three statutory allocation fractions of tangible property, wages and gross receipts provided for in the Act of 1935 and its amendments, when applied to the value of defendant's capital stock, determine the value of defendant's franchise or privilege of

doing business within Pennsylvania for the purpose of the imposition of the Franchise Tax.

4. The Franchise Tax, as thus measured by the statutory allocation fractions applied to the value of defendant's capital stock, does not impose an unconstitutional tax or burden upon the United States securities or any other property owned by the defendant.

5. The Franchise Tax settlement made against defendant for the year 1952 does not violate any provisions of the Constitution of the United States or the Constitution of Pennsylvania.

6. In all cases arising between the Commonwealth and its taxpayers, the Franchise Tax has been construed as an excise tax on the privilege of doing business in Pennsylvania, and the nature of the Franchise Tax on said privilege has not been altered by pronouncements in cases construing the power of local political subdivisions to impose taxes on the same privilege, transaction, subject, occupation or personal property as are taxed by the Commonwealth.

7. The decision in this case that the Franchise Tax is an excise tax upon the privilege of doing business in Pennsylvania does not violate the due process clause of the Constitution of the United States, because of any ruling pronouncement or dictum to the contrary made in cases involving the power of local political subdivisions to impose taxes.

8. The facts averred in paragraphs 3 and 6 of the Stipulation of Facts are excluded from the evidence considered in this case, because they are irrelevant and immaterial to the issues presented in this case.

9. The facts averred in paragraph 9 of the Stipulation of Facts are excluded from the evidence in this case, because they are irrelevant and immaterial.

10. The facts averred in paragraph 11(b) of the Stipulation of Facts are excluded from the evidence considered in this case, because they are irrelevant and immaterial.

11. The facts averred in paragraph 13 of the Stipulation of Facts are excluded from the evidence in this case, because they are irrelevant and immaterial.

12. The defendant's appeal is dismissed, the settlement of Franchise Tax against the defendant is sustained, and judgment is directed to be entered in favor of the Commonwealth and against the defendant in the amount of Fifty-Eight Thousand, Three Hundred Twenty-One and 60/100 Dollars ($58,321.60); and the said tax of Fifty-Eight Thousand, Three Hundred Twenty-One and 60/100 Dollars ($58,321.60), having been paid by the defendant, the said judgment shall be marked satisfied by the Prothonotary upon payment by the defendant of the costs in the case.

Respectfully submitted,

GEORGE W. KEITEL,
Deputy Attorney General,
Counsel for Commonwealth of Pennsylvania.

VI.
DEFENDANT'S REQUESTS FOR FINDINGS OF FACT.

National Biscuit Company, Defendant herein, by its attorneys, Leslie M. Swope and Roy J. Keefer, requests your Honorable Court to make the following Findings of Fact:

1. Defendant was incorporated under the laws of the State of New Jersey on February 3, 1898. It registered and qualified to do business in Pennsylvania on March 28, 1899 and re-registered on August 21, 1933, under the Business Corporation Law of 1933 to engage in Pennsylvania in the business of "manufacture and sale of bakery products."

(Commonwealth's Exhibit 7, hereinafter in these Requests referred to as "Stipulation of Facts", paragraph 1.)

2. Defendant's principal office and address are at 449 West Fourteenth Street, New York, New York; and its registered address in Pennsylvania is Fidelity-Philadelphia Trust Building, 123 South Broad Street, Philadelphia, Pennsylvania, c/o C. T. Corporation System.

(Stipulation of Facts, paragraph 2.)

3. During the year 1952, defendant had 365 places of business, 21 in Pennsylvania and 344 outside of Pennsylvania; its President, Secretary and Treasurer were located and performed their duties at 449 West Fourteenth Street, New York, New York; no Assistant Treasurer or Assistant Secretary resided or performed his duties in Pennsylvania; the annual meeting of its stockholders was held at 1 Exchange Place, Jersey

City, New Jersey; and its directors met, its principal bank account was maintained, and its bonds, securities, etc. were kept in New York City.

(Stipulation of Facts, paragraph 3.)

4. During the year 1952, defendant was engaged within and without Pennsylvania in the manufacture and sale of bakery products; and it held, owned and controlled at its principal office in New York City its investments in United States securities and in shares of stock of subsidiary companies operating in foreign countries. These investments were made, all activities in connection therewith were carried on, and all income therefrom was received, by that office.

(Stipulation of Facts, paragraph 4.)

5. For the purposes of this case the business of the subsidiary companies was independent of and unrelated to the business conducted by defendant in the United States, including Pennsylvania.

(Stipulation of Facts, paragraph 5.)

6. Defendant, at its principal office at 449 West Fourteenth Street, New York, New York, performed administrative and executive functions involving management and control which included production, expenditures, investments, purchasing, pricing, advertising, sales programming, credit, personnel, compensation, accounting, taxes and legal service.

(Stipulation of Facts, paragraph 6.)

7. The tax involved in the present proceeding is known as the "Franchise Tax", which is imposed on foreign corporations under the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto

being the Act of May 29, 1951, P. L. 462, 72 Purdon's Statutes, Sections 1871 and 1901—these acts to be referred to hereinafter as the Act of 1935 and Amendments.

(Stipulation of Facts, paragraph 7.)

8. Using a report form furnished to it by the Department of Revenue, defendant duly completed and filed with that Department its "Franchise Tax" report for the year 1952.

(Commonwealth's Exhibit 1; Notes of Testimony, hereinafter in these Requests referred to as "N. T.", page 5; Stipulation of Facts, par. 8.)

9. As shown by said report and by the corresponding report for 1951, defendant owned *inter alia* the following as of January 1, 1952 and as of December 31, 1952:

	Jan. 1, 1952	Dec. 31, 1952
Investment in United States securities	$ 19,108,500.00	$ 26,300,000.00
Investment in shares of stocks of subsidiary companies operating in foreign countries (More than fifty per cent owned	7,883,161.00	8,823,465.00
Investment in tangible property in Pennsylvania	7,006,593.00	6,333,877.00
Cash—Demand deposits	17,377,854.00	13,620,326.00
Accounts Receivable	12,520,993.00	10,229,670.00
Total Assets	185,986,841.00	194,941,349.00

(Stipulation of Facts, paragraph 9; Commonwealth's Exhibit 1.)

10. On the basis of said report and pursuant to the purported provisions of the Act of 1935 and Amendments, the Department of Revenue, on October 28, 1953, settled and, on November 5, 1953, the Department of the Auditor General approved settlement of "Franchise Tax" against defendant for the year 1952.

(Commonwealth's Exhibit 1; Stipulation of Facts, paragraph 10 and Exhibit A attached thereto.)

11. Said settlement was made by the taxing departments upon the theory that the tax imposed by the Act of 1935 and Amendments was an excise tax on foreign corporations for the privilege of doing business in Pennsylvania:

(a) In said settlement, the taxable value is determined by applying the statutory allocation fractions of tangible property, wages and gross receipts to defendant's capital stock valuation of $160,000,000 as determined by the taxing departments and the resulting taxable value is $11,664,320, to which the tax rate of five mills is applied.

(b) If the taxable value were determined by applying the ratio of defendant's average tangible property in Pennsylvania over its total assets less its investment in stocks of foreign subsidiaries times its capital stock valuation $\left(\frac{6,670,235}{194,941,349 - 8,823,465} \times\right.$ $160,000,000), the resulting taxable value would be $5,734,202, which times the tax rate of five mills produces tax of $28,671.01. It is agreed that the method

used in settling capital stock tax against defendant and other foreign corporations under Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, prior to the amendments thereto by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462, was the ratio of average tangible property in Pennsylvania over *total* assets times the *entire* capital stock value. The difference between this formula and that set forth above as applicable to defendant under the property tax theory for the year 1952 is caused by the fact, as disclosed in paragraph 12 of the Stipulation of Facts, that defendant's investments in stocks of subsidiaries and the income derived therefrom were excluded in the appraisal of its capital stock at $160,000,000, it being the intention of the parties hereto that said exclusion of stocks of subsidiaries and the income therefrom in said appraisal is not at issue for the purposes of this case.

(Stipulation of Facts, paragraph 11, as amended.)

12. In appraising defendant's entire capital stock at a valuation of $160,000,000, the taxing departments included all of the defendant's tangible and intangible assets as listed in the Balance Sheet of its "Franchise Tax" report for 1952, except its investment in shares of stock of subsidiary companies operating in foreign countries. This investment and the income derived therefrom were excluded by the taxing departments in the appraisal of defendant's capital stock.

(Stipulation of Facts, paragraph 12.)

13. In settling capital stock tax (construed by the Pennsylvania courts to be a property tax) against Pennsylvania corporations for the year 1952, the taxing

departments treated as exempt or non-taxable assets, investments of such corporations in:

(a) Securities of the United States, its agencies and instrumentalities;

(b) Commonwealth of Pennsylvania bonds;

(c) Shares of foreign corporations more than fifty percent owned whose capital stock represented property and assets located or having a situs outside of Pennsylvania;

(d) Shares of other Pennsylvania corporations liable to or relieved from payments of Capital Stock Tax to Pennsylvania;

(e) Shares of banks and banks and trust companies paying tax on their shares to Pennsylvania; and

(f) Tangible property located outside of Pennsylvania;

whereas such investments of foreign corporations were not accorded similar treatment by the taxing departments in the settlements of the so-called "Franchise Tax" made against foreign corporations, including the defendant, for the year 1952. In the case of Pennsylvania corporations, the tax formula is the tax rate times the taxable value which is obtained by applying the ratio of non-exempt or taxable assets to total assets times the capital stock valuation. In the case of foreign corporations, the tax formula is the tax rate times the taxable value which represents the sum of the results obtained by applying each of the three statutory allocation fractions, where applicable as provided in the 1935 Act and amendatory Acts, to one-third of the capital stock valuation.

(Stipulation of Facts, paragraph 13.)

14. On January 26, 1954, the defendant filed with the Department of Revenue its Petition for Resettlement of the "Franchise Tax" settled against it for the year 1952, and, on February 11, 1954, the Departments of Revenue and Auditor General refused the prayer of said Petition for Resettlement.

(Commonwealth's Exhibits 2 and 3; N. T., page 5; Stipulation of Facts, paragraph 14.)

15. On March 11, 1954, defendant filed with the Board of Finance and Revenue its Petition for Review of the action of the Departments of Revenue and Auditor General in refusing its Petition for Resettlement and, on March 17, 1954, the said Board refused the prayer of its Petition for Review.

(Commonwealth's Exhibits 4 and 5; N. T., pp. 5 and 6; Stipulation of Facts, paragraph 15.)

16. On April 14, 1954, defendant duly filed with the Prothonotary of Dauphin County its Appeal and Specification of Objections to said settlement and to the refusal of its Petition for Review by the Board of Finance and Revenue; and on May 18, 1954, defendant duly filed an appeal bond as required by law.

(Stipulation of Facts, paragraph 16; Defendant's Exhibits 2 and 3.)

17. Defendant made payment in full of the "Franchise Tax" settled against it for the year 1952, as follows:

By check—March 5, 1953	$58,308.88
By transfer of 1951 "Franchise Tax" credit	12.72
Total	$58,321.60

(Stipulation of Facts, paragraph 17; Commonwealth's Exhibit 6; N. T., page 6.)

18. It is further stipulated and agreed by and between counsel for the Commonwealth of Pennsylvania and counsel for National Biscuit Company, defendant, that the entire record in the case of *National Biscuit Company v. Philadelphia,* 374 Pa. 604 (National Biscuit Company, one of the appellees in this case is the same as the defendant in the present proceeding) shall be incorporated in the record of the present proceeding by reference as evidence of the facts and issues in that proceeding, without the necessity of copying the same in the transcript of the record in the present proceeding; and that any part or parts thereof may be quoted in the argument and briefs by either party hereto at any stage, including any appellate stage, of this proceeding, as though fully appearing in the record in the present proceeding, subject to the right of the adverse parties to object to the relevancy or materiality thereof. For the purposes of this paragraph, it is further agreed that the said record shall include, but not be limited to, Appellants' printed Record (Nos. 214, 215 and 216 January Term, 1953), Appellees' printed Supplemental Record (Nos. 214, 215 and 216 January Term, 1953), the Philadelphia Ordinance and the Sterling Act (Act of August 5, 1932, Special Session 1932, P. L. 45) there involved, Appellee's Petition for Reargument (No. 214 January Term, 1953), the opinions of the several justices of the Supreme Court of Pennsylvania, and also, Appellants' Brief and Supplemental Brief (Nos. 214, 215 and 216 January Term, 1953), and Appellees' Brief and Reply Brief (Nos. 214, 215 and 216 January Term, 1953).

(Stipulation of Facts, paragraph 19.)

19. The parties hereto further agree that the court, in considering the issues raised in the present proceeding, may examine the printed Briefs and Records and statutes or ordinances in any case decided by the courts of this Commonwealth involving the nature of the Franchise Tax imposed by the Act of 1935 and Amendments and of the Capital Stock Tax previously imposed on foreign corporations.

(Stipulation of Facts, paragraph 19.)

20. On December 9, 1952 the City of Philadelphia enacted an ordinance imposing an annual mercantile license tax for the year 1953 and annually thereafter upon, inter alia, every manufacturing corporation desiring to engage in or to continue to engage in business in Philadelphia, at the rate of three mills on each dollar of the annual gross volume of business, as defined in the ordinance, transacted by such corporation (or in the alternative at the optional rate of two percent of the annual gross volume of business transacted by such company less the cost of goods and less the cost of labor), and required every such company to procure a mercantile license and pay a license fee of $3.00 for each place of business in the city.

(Defendant's Exhibit No. 1; Ordinance (§§ 2, 3).)

21. Said ordinance was enacted under the purported authority of an enabling act known as the "Sterling Act" which gave the city authority to levy taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of the city, except that city council shall not have authority to levy any tax on a privilege, transaction, subject, or occupation, or on personal property "which is now or may hereafter become subject to a State tax or license fee".

(Act of August 5, 1932, Ex. Sess., P. L. 45, 53 P. S. 4613; *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 610.)

22. The defendant, National Biscuit Company, which was then and still is doing business in Philadelphia, filed a complaint in equity, in the Common Pleas Court of Philadelphia County, to enjoin the City of Philadelphia from levying the said tax upon the Company for the reason, among others, that the Company was subject to and required to pay to the Commonwealth of Pennsylvania for the privilege of doing business therein, a franchise tax under §§ 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, 72 P. S. 1871-1901, and that consequently the city's mercantile license fee and tax levy, as applied to National Biscuit Company, was not authorized by the Sterling Act but, on the contrary, was prohibited by such statute because, inter alia, complainant was subject to and paid the State Franchise Tax above mentioned.

(Defendant's Exhibit No. 1—Record 6(a), 8(a), *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 610-611.)

23. In its briefs and arguments before the Supreme Court of Pennsylvania, National Biscuit Company strenuously argued that, being already subject to a State excise tax for the privilege of doing business known as the Foreign Franchise Tax, it could not, under the Sterling Act, be again subjected to an excise tax for the privilege of doing business by the City of Philadelphia.

(Defendant's Exhibit No. 1—Brief for Appellees, pages 30-31; Petition for Reargument, pages 1-3, 6-7.)

24. The Supreme Court of Pennsylvania rejected the contention of National Biscuit Company on the ground that while the Philadelphia mercantile license tax is an excise tax, the State Franchise Tax on foreign corporations is in reality a property tax on the property of the corporation.

(*National Biscuit Co. v. Philadelphia*, 374 Pa. 605, 612-614.)

25. In the event that the "Franchise Tax" settlement against defendant for the year 1952 is sustained, it is agreed that judgment should be entered in favor of the Commonwealth and against defendant in the amount of $58,321.60 which, having been duly paid, should be marked satisfied.

(Stipulation of Facts, paragraph 18, as amended.)

26. If the Court finally determines that Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184 and subsequent amendatory acts (the last relevant amendatory act being the Act of May 29, 1951, P. L. 462) imposes a property tax on defendant which is determinable on the basis of the computation in Defendant's Request for Finding of Fact No. 11(b), it is agreed that judgment should be entered in favor of the Commonwealth and against the defendant in the amount of $28,671.01 which, having been paid, should be marked satisfied and a credit of $29,650.59, representing tax overpayment by defendant should be directed to be entered in favor of defendant on the proper books and records of the Departments of Revenue and Auditor General.

(Stipulation of Facts, paragraph 18, as amended.)

27. In the event that the Court finally determines this case on any basis other than those set forth in Defendant's Requests for Findings of Fact Nos. 25 and 26, the parties agree that the Record in the present case shall be reopened in order to submit to the Court such additional evidence as may be necessary to enable it to enter judgment.

(Stipulation of Facts, paragraph 18, as amended.)

28. If the settlement in controversy should be corrected only to the extent of excluding, from the computation, defendant's investment in U. S. securities, the tax should be resettled in the amount of $50,080.27 computed as follows: $26,300,000 (total U. S. securities) over $186,117,884 (total assets less foreign subsidiaries) times $160,000,000 equals $22,609,331 (exempt capital stock value of U. S. securities. Subtracting the last figure from $160,000,000 (value of capital stock per settlement) results in adjusted capital stock value of $137,390,669, to which should be applied the composite allocation fraction or percentage shown in the settlement of .072902, thus producing a taxable value of $10,016,054.55 and applying thereto the tax rate of five mills results in a tax of $50,080.27, and a reduction in tax of $8,241.33, attributable to the exemption for investments in U. S. securities.

Respectfully submitted,

/s/ LESLIE M. SWOPE,
DRINKER, BIDDLE AND REATH,
/s/ ROY J. KEEFER,
HULL, LEIBY AND METZGER,
Counsel for Defendant.

VII.

DEFENDANT'S REQUESTS FOR CONCLUSIONS OF LAW.

National Biscuit Company, Defendant herein, by its attorneys, Leslie M. Swope and Roy J. Keefer, requests your Honorable Court to make and adopt the following Conclusions of Law as applicable to the determination of this cause:

1. The tax imposed on foreign corporations by the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462, hereinafter referred to as the Act of 1935 and Amendments, is a tax on defendant's capital stock and is by its incidence a property tax.

2. The "Franchise Tax" settlement against defendant for the year 1952 was made by the Departments of Revenue and Auditor General pursuant to the purported provisions of the Act of 1935 and Amendments.

3. All of defendant's intangible assets, including its investments in stocks of subsidiary companies and in United States securities, are beyond the power and jurisdiction of Pennsylvania to levy a property tax thereon.

4. The statutory allocation fractions of tangible property, wages and gross receipts as provided for in the Act of 1935 and Amendments, when applied to defendant's entire capital stock value, do not determine the value of its property located in Pennsylvania. See *Com. v. Columbia Gas and Electric Corporation*, 336 Pa. 209, 221.

5. The "Franchise Tax" settlement made against defendant for the year 1952 and the Act of 1935 and Amendments, if authorizing the said settlement, violate the due process and property clauses of Sections 1, 9 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that property tax is imposed therein on defendant's intangible and tangible property or assets located or having a situs outside of the Commonwealth of Pennsylvania.

6. The "Franchise Tax" settled against defendant for the year 1952, wherein tax is imposed on its property and assets, violates the uniformity of taxation provisions of Section 1 of Article IX of the Constitution of the Commonwealth of Pennsylvania and the equal protection of the laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions from taxation, particularly of United States securities and tangible property located outside of Pennsylvania, granted to domestic corporations in tax settlements on their capital stock, are denied to defendant, a foreign corporation.

7. The "Franchise Tax" settled against defendant for the year 1952, wherein tax is imposed on its property and assets, violates Article VI, Clause 2 and Article I, Section 8, Clause 2, of the Constitution of the United States, in that tax is imposed in part upon defendant's investment in United States securities.

8. The tax imposed on foreign corporations, including the defendant, by the Act of 1935 and Amendments is the "equivalent" of a property tax.

9. For the additional reason that the tax imposed by the Act of 1935 and Amendments is the "equiv-

alent" of a property tax, the "Franchise Tax" settled against defendant for the year 1952 violates Article VI, Clause 2 and Article I, Section 8, Clause 2, of the Constitution of the United States, in that the incidence of the tax is in part upon defendant's investment in United States securities.

10. The "Franchise Tax" settled against defendant for the year 1952, wherein tax is imposed on its property and assets, violates Section 3701 of the Revised Statutes of the United States, 31 U. S. C., Section 742, which generally exempts interest-bearing obligations of the United States from state and local taxation.

11. For the additional reason that the tax imposed by the Act of 1935 and Amendments is the "equivalent" of a property tax, the "Franchise Tax" settled against defendant for the year 1952 violates Section 3701 of the Revised Statutes of the United States, 31 U. S. C., Section 742, which generally exempts interest bearing obligations of the United States from state and local taxation, in that the incidence of the tax is in part upon defendant's investment in United States securities.

12. To sustain the Act of 1935 and Amendments and the tax settlement made against defendant thereunder for the year 1952 as imposing a franchise or excise tax on defendant for the privilege of doing business in Pennsylvania and not a property tax, would be inconsistent with the decision of the Supreme Court of Pennsylvania in the case of *National Biscuit Company v. Philadelphia*, 374 Pa. 604 (National Biscuit Company, one of the appellees in that case is the same as the defendant in the present proceeding) and with similar prior decisions of that Court, and would, in such event and under such circumstances, violate the Pennsylvania and Federal Constitutions as follows:

(a) The due process and property clauses of Sections 1, 9 and 10 of Article I of the Constitution of Pennsylvania and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that such decision would be inconsistent with the above mentioned prior decision rendered against the defendant, would be arbitrary and unreasonable, and would deny defendant a reasonable adjudication of its rights.

(b) The uniformity clause of Section 1 of Article IX of the Constitution of Pennsylvania and the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions from taxation granted to domestic corporations in tax settlements on their capital stock would be denied to defendant, a foreign corporation, on the basis of semantics and of distinctions having no substance or reality.

13. Defendant's tax liability for the year 1952 under the Act of 1935 and Amendments, should be determined by eliminating in the tax computation any tax liability on defendant's tangible property located outside of Pennsylvania, its investments in United States securities and its other intangible assets.

14. Judgment should be entered in favor of the Commonwealth and against the defendant in the amount of Twenty-eight Thousand Six Hundred Seventy-one Dollars and one cent ($28,671.01), computed as set forth in defendant's Request for Findings of Fact No. 26, which, having been overpaid, should be marked satisfied, and said judgment should order a credit of Twenty-nine Thousand Six Hundred Fifty Dollars and Fifty-nine cents ($29,650.59) to be entered in favor of defendant on the proper books and rec-

ords of the Department of Revenue and the Department of the Auditor General.

15. If the tax settlement should be corrected only to the extent of excluding from the computation, defendant's investment in United States securities, judgment should be entered in favor of the Commonwealth and against the defendant in the amount of Fifty Thousand Eighty Dollars and Twenty-seven Cents ($50,080.27), computed as set forth in defendant's Request for Finding of Fact No. 28, which, having been paid, should be marked satisfied, and said judgment should order a credit of Eight Thousand Two Hundred Forty-one Dollars and Thirty-three Cents ($8,241.33) to be entered in favor of the defendant on the proper books and records of the Department of Revenue and the Department of the Auditor General.

16. The Board of Finance and Revenue erred in making the following decision:

"And now, to wit, March 17, 1954.

"This petition for review is refused and the action taken by the Department of Revenue, approved by the Department of the Auditor General, is hereby sustained."

17. The appeal is sustained at the cost of the Commonwealth.

Respectfully submitted,

/s/ LESLIE M. SWOPE,
DRINKER, BIDDLE & REATH,
/s/ ROY J. KEEFER,
HULL, LEIBY AND METZGER,
Counsel for the Defendant.

VIII.

OPINION FILED WITH JUDGMENT NISI.

By THE COURT:

The defendant filed its franchise tax report for the year 1952. In due time, the tax was settled in the amount of $58,321.60. Petitions for resettlement and for review were filed, and refused in each instance. This appeal followed. The parties agreed to a trial without a jury. A hearing was held, at which time testimony was received, including a stipulation of facts. The case has been argued and is now ripe for decision.

We adopt as findings of fact the first seventeen paragraphs of the stipulation of the parties. They are too extensive to be included herein, so we incorporate them by way of reference. The Commonwealth has objected to paragraphs 3, 6, 9, 11b and 13, on the ground of irrelevancy. However, in order that the whole picture may be shown, we include them in our findings. We shall briefly summarize the salient facts.

The defendant was incorporated in the State of New Jersey and has its principal office in New York. It duly registered to do business in Pennsylvania and was engaged, during the tax year in question, in the manufacture and sale of bakery products in this State. It filed its franchise tax report for said year on which the tax was settled as aforesaid. In computing the tax, the value of the defendant's capital stock was fixed at $160,000,000.00, which excluded investments in stock of subsidiaries operating in foreign countries. There is no controversy as to this. Otherwise, the statutory formula was applied resulting in a taxable value of $11,664,320.00. Applying the 5 mills rate to this produced the tax of $58,321.60, all of which has been paid.

CONTENTION OF THE PARTIES

The defendant takes the position that the Supreme Court of Pennsylvania has declared the franchise tax imposed on foreign corporations doing business in Pennsylvania to be a property tax; that consequently, in making the tax computation, you must exclude United States securities and extra-territorial tangible and intangible assets. To do so, would reduce the tax to $27,373.36.

The Commonwealth, on the contrary, relies upon certain Supreme Court opinions which have held that the franchise tax is a tax for the privilege of doing business in Pennsylvania and is not per se a tax on corporate assets. Hence, it argues, the United States securities and extra-territorial assets must be included in the computation, save in those cases where it would bring about an unconstitutional result.

DISCUSSION

The statute with which we are here dealing is the Act of 1935, P. L. 184, which amended the Act of 1889 P. L. 420; 72 P. S. 1871. By this Act a tax was imposed on foreign corporations doing business in Pennsylvania. Section 20 of the Act requires such corporations to file reports. Section 21 imposes the tax, which the Act calls a "franchise" tax; 72 P. S. 1871(b). The tax base is determined by multiplying one-third of the capital stock valuation by three allocation fractions usually called the tangible property fraction, the wages and salary fraction, and the gross receipts fraction. This was the method used in the present case in computing the tax.

The Supreme Court has considered this Act a number of times. In Com. v. Columbia Gas & Electric Corp., 336 Pa. 209, the constitutionality of the act gen-

erally was upheld. In the course of its opinion the Court said:

"... the tax is a franchise tax and not a property tax." p. 217.

... "the incidence of the tax is fixed upon the value of the franchise; not upon the property itself;" p. 219.

The Act is designed to determine the value of "the franchise or right to do business in this State ..."; p. 219.

In Com. v. Ford Motor Co., 350 Pa. 236, the Court said:

"This Act imposes a *franchise* or *excise* tax upon foreign corporations, as distinguished from a property or ad valorem tax"; p. 240.

"In the *Columbia Gas and Electric Corp.* case supra, we held that the tax, not being a property tax, but a tax upon the privilege of engaging in business in this Commonwealth, should be measured by a valuation, etc. ..." p. 241.

In Com. v. Quaker Oats Co., 350 Pa. 253, the Court said:

"... the tax is imposed upon the privilege of doing business here, measured by capital stock"; p. 260.

In Com. v. Monessen Amusement Co., 352 Pa. 120, the Court stated:

"Appellee's contention in the present case and the decision of the court below are both rested on the false assumption that the franchise tax, in some way, is a tax on the *property* of the corporation which is used as a measure of the tax"; p. 122.

"As we stated in Commonwealth v. *Ford Motor Company*, supra, the franchise tax is not a tax upon the property of the corporation, but upon the doing of business in this Commonwealth"; p. 123.

In Com. v. American Gas Co., 352 Pa. 113, it is stated:

"The former capital stock tax upon foreign corporations was a *property* tax which could only be imposed upon corporations having property subject to the jurisdiction of the taxing authorities. The franchise tax, however, is a tax on the privilege of doing business and is an *excise* tax, as we have pointed out in numerous cases"; p. 117.

These opinions were handed down in the years 1939, 1944, 1944, 1945, 1945 respectively. They were followed in 1948, 1950 and 1953 by three cases on which the appellant relies. The first of these is Federal Drug Co. v. Pittsburgh, 358 Pa. 454. This involved the Pittsburgh mercantile license tax passed pursuant to the Act of 1947, P. L. 1145, sometimes known as the "Tax Anything Act". The Supreme Court said:

"In the second place, while in each case the object of the tax is to license for the purpose of doing business, the tax actually imposed by the Foreign Corporate Franchise Tax is *measured* by the *value* of the property of the foreign corporation within the state. In the Pittsburgh ordinance the tax is on the gross volume of business conducted by the taxpayer. The respective impacts of the two taxes are on a totally different basis;" p. 457. (Underscoring ours.)

It will be noted that the Supreme Court did not say here that the franchise tax was on the *property* of the corporation, but that it was *measured* by the *value* of the property within the state.

The second case is Murray v. Philadelphia, 364 Pa. 157. Here another ordinance was under attack. The Court said that the Sterling Act was designed to prevent the City from taxing the same thing taxed by the State and thus avoid double taxation (p. 165). It added:

> "In determining whether double taxation results, whether the city tax conflicts with that imposed by the State, the practical operation of the two taxes is controlling as against mere difference in terminology from time to time employed in describing taxes in various cases" (p. 165).

And on page 170, the Court said that the franchise tax "was obviously devised to reach the property of foreign corporations as the equivalent of the capital stock tax."

The third case is National Biscuit Co. v. Philadelphia, 374 Pa. 604, to which the present appellant was a party. There the plaintiff resisted paying a tax under a city ordinance. The real basis of the complaint was that the ordinance imposed a tax on the same base as the state franchise tax, contrary to the provisions of the Sterling Act, 1932 P. L. 45. The Supreme Court sustained the Ordinance, and, inter alia, stated:

> ". . . as to the payments made to the Commonwealth of capital stock taxes, corporate net income taxes, foreign corporation franchise taxes, and taxes on net earnings or income, it need merely be pointed out that all those taxes have been held, many times, to be property taxes"; p. 612.

Relying upon these three cases, the appellant argues that if the franchise tax is a *property* tax, we must exclude from the tax computation all United States securities and extra-territorial tangible and intangible assets, as would be done in a capital stock tax settlement. We cannot believe that the Supreme Court intended any such result. To do so might seriously impair the general tax structure of the Commonwealth.

The latter three cases mentioned above did not expressly overrule the first five referred to. The latter three were not contests between the State and its taxpayers. Interpretation and application of the franchise tax act were not directly involved. We know of no case in which the Supreme Court has deviated from its declaration that the franchise tax is a tax on foreign corporations for the privilege of doing business in Pennsylvania. Nor do we know of any case in which it has not approved of the statutory formula in computing the tax, except when such application would bring about an unconstitutional result. Finally, we know of no case in which a foreign corporation has been allowed to deduct United States securities and extra-territorial tangible and intangible assets, in making the tax computation. They have heretofore been included in order to arrive at the fair value of the privilege enjoyed. But they have not, to our knowledge, been taxed directly. They have been included in the formula to arrive at a valuation which becomes the tax base. No matter what terminology has been employed as to the nature of the tax, or what adjectives have been used to describe it, the reported cases between the Commonwalth and its taxpayers, in which the statute is applied, have consistently held as we have indicated. It is our conclusion, therefore, that the tax settlement in the present case was correct.

CONCLUSIONS OF LAW

1. The foreign corporation tax, no matter by what name called, is a tax for the privilege of doing business in this State.

2. The Federal securities and extra-territorial tangible and intangible assets of the appellant were properly included in the tax computation.

3. The Act imposing a franchise tax on foreign corporations for the privilege of doing business in Pennsylvania, does not tax United States securities or extraterritorial tangible and intangible assets.

4. The tax in the present instance was properly settled in the amount of $58,321.60.

5. The tax has been paid.

6. The appeal should be dismissed.

IX.
JUDGMENT NISI.

ORDER.

AND NOW, to wit: April 12, 1956, the appeal is dismissed and judgment shall be entered in favor of the Commonwealth and against the defendant in the amount of $58,321.60, which judgment shall be marked satisfied upon payment of the costs, unless exceptions hereto be filed within thirty days hereof. The Prothonotary shall notify the parties or their counsel of this decree forthwith.

/s/ KARL E. RICHARDS,
President Judge Orphans' Court.

X.

DEFENDANT'S EXCEPTIONS.

AND Now, this 27th day of April, 1956, National Biscuit Company, defendant in the above entitled case, files the following Exceptions to the Findings of Fact, Conclusions of Law, Opinion and Judgment Nisi of the Court entered on April 12, 1956, and to the failure or refusal of the Trial Judge to affirm Defendant's requests for findings of fact and conclusions of law, the specific exceptions being as follows:

1. The Learned Trial Judge, by apparently failing to adopt, as findings of fact, paragraph 11(b) of the Stipulation of Facts, *as amended*, and by not adopting paragraph 18 of the Stipulation of Facts *as amended*, erred in his Opinion in making the following finding and determination of the amount of tax due under defendant's theory:

> "To do so, would reduce the tax to $27,373.30."

2. The learned Trial Judge erred in making the following finding and determination in his Opinion:

> "The third case is National Biscuit Co. v. Philadelphia, 374 Pa. 604, to which the present appellant was a party. There the plaintiff resisted paying a tax under a city ordinance. The real basis of the complaint was that the ordinance imposed a tax on the same base as the state franchise tax, contrary to the provisions of the Sterling Act, 1932 P. L. 45."

3. The learned Trial Judge erred in making the following finding and determination in his Opinion.

"Relying upon these three cases, the appellant argues that if the franchise tax is a *property tax*, we must exclude from the tax computation all United States securities and extra-territorial tangible and intangible assets, as would be done in a capital stock tax settlement. We cannot believe that the Supreme Court intended any such result. To do so might seriously impair the general tax structure of the Commonwealth."

4. The learned Trial Judge erred in making the following finding and determination in his Opinion:

"We know of no case in which the Supreme Court has deviated from its declaration that the franchise tax is a tax on foreign corporations for the privilege of doing business in Pennsylvania."

5. The learned Trial Judge erred in making the following finding and determination in his Opinion:

"No matter what terminology has been employed as to the nature of the tax, or what adjectives have been used to describe it, the reported cases between the Commonwealth and its taxpayers, in which the statute is applied, have consistently held as we have indicated. It is our conclusion, therefore, that the tax settlement in the present case was correct."

6. The learned Trial Judge erred in his First Conclusion of Law, which reads as follows:

"1. The Foreign corporation tax, no matter by what name called, is a tax for the privilege of doing business in this State."

7. The learned Trial Judge erred in his Second Conclusion of Law, which reads as follows:

"2. The Federal securities and extra-territorial tangible and intangible assets of the appellant were properly included in the tax computation."

8. The learned Trial Judge erred in his Third Conclusion of Law, which reads as follows:

"3. The Act imposing a franchise tax on foreign corporations for the privilege of doing business in Pennsylvania, does not tax United States securities or extra-territorial tangible and intangible assets."

9. The learned Trial Judge erred in his Fourth Conclusion of Law, which reads as follows:

"4. The tax in the present instance was properly settled in the amount of $58,321.60."

10. The learned Trial Judge erred in his Sixth Conclusion of Law, which reads as follows:

"6. The appeal should be dismissed."

11. The learned Trial Judge erred in failing or refusing to adopt defendant's request for findings of fact No. 11(b) (based on paragraph 11(b) of the Stipulation of Facts, *as amended*), which request was as follows:

"(b) If the taxable value were determined by applying the ratio of defendant's average tangible property in Pennsylvania over its total assets less its investment in stocks of foreign subsidiaries times its capital stock valuation $\left(\frac{6,670,235}{194,941,349 - 8,823,465} \times \$160,000,000\right)$, the resulting taxable value would be $5,734,202, which times the tax rate of five mills produces tax of $28,671.01. It is agreed that the method used in

settling capital stock tax against defendant and other foreign corporations under Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, prior to the amendments thereto by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462, was the ratio of average tangible property in Pennsylvania over *total* assets times the *entire* capital stock value. The difference between this formula and that set forth above as applicable to defendant under the property tax theory for the year 1952 is caused by the fact, as disclosed in paragraph 12 of the Stipulation of Facts, that defendant's investments in stocks of subsidiaries and the income derived therefrom were excluded in the appraisal of its capital stock at $160,000,000, it being the intention of the parties hereto that said exclusion of stocks of subsidiaries and the income therefrom in said appraisal is not at issue for the purposes of this case."

12. The learned Trial Judge erred in failing or refusing to affirm defendant's Eighteenth request for findings of fact, which request was as follows:

"18. It is further stipulated and agreed by and between counsel for the Commonwealth of Pennsylvania and counsel for National Biscuit Company, defendant, that the entire record in the case of *National Biscuit Company v. Philadelphia*, 374 Pa. 604 (National Biscuit Company, one of the appellees in this case is the same as the defendant in the present proceeding) shall be incorporated in the record of the present proceeding by reference as evidence of the facts and issues in that proceeding, without the necessity of copying the

same in the transcript of the record in the present proceeding; and that any part or parts thereof may be quoted in the argument and briefs by either party hereto at any stage, including any appellate stage, of this proceeding, as though fully appearing in the record in the present proceeding, subject to the right of the adverse parties to object to the relevancy or materiality thereof. For the purposes of this paragraph, it is further agreed that the said record shall include, but not be limited to, Appellants' printed Record (Nos. 214, 215 and 216 January Term, 1953), Appellees' printed Supplemental Record (Nos. 214, 215 and 216 January Term, 1953), the Philadelphia Ordinance and the Sterling Act (Act of August 5, 1932, Special Session 1932, P. L. 45) there involved, Appellee's Petition for Reargument (No. 214 January Term, 1953), the opinions of the several justices of the Supreme Court of Pennsylvania, and also, Appellants' Brief and Supplemental Brief (Nos. 214, 215 and 216 January Term, 1953), and Appellees' Brief and Reply Brief (Nos. 214, 215 and 216 January Term, 1953). (Stipulation of Facts, paragraph 19)"

13. The learned Trial Judge erred in failing or refusing to affirm defendant's Nineteenth request for findings of fact, which request was as follows:

"19. The parties hereto further agree that the court, in considering the issues raised in the present proceeding, may examine the printed Briefs and Records and statutes or ordinances in any case decided by the courts of this Commonwealth involving the nature of the Franchise Tax imposed by the Act of 1935 and Amendments and of the Capital Stock Tax previously imposed on

foreign corporations. (Stipulation of Facts, paragraph 19)"

14. The learned Trial Judge erred in failing or refusing to affirm defendant's Twentieth request for findings of fact, which request was as follows:

"20. On December 9, 1952 the City of Philadelphia enacted an ordinance imposing an annual mercantile license tax for the year 1953 and annually thereafter upon, inter alia, every manufacturing corporation desiring to engage in or to continue to engage in business in Philadelphia, at the rate of three mills on each dollar of the annual gross volume of business, as defined in the ordinance, transacted by such corporation (or in the alternative at the optional rate of two percent of the annual gross volume of business transacted by such company less the cost of goods and less the cost of labor), and required every such company to procure a mercantile license and pay a license fee of $3.00 for each place of business in the city. (Defendant's Exhibit No. 1; Ordinance (§§ 2, 3))"

15. The learned Trial Judge erred in failing or refusing to affirm defendant's Twenty-first request for findings of fact, which request was as follows:

"21. Said ordinance was enacted under the purported authority of an enabling act known as the 'Sterling Act' which gave the city authority to levy taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of the city, except that city council shall not have authority to levy any tax on a privilege, transaction, subject, or occupation, or on personal property 'which is now or may hereafter become subject to a State tax or license fee'. (Act of August 5, 1932, Ex. Sess., P. L. 45, 53 P. S. 4613;

National Biscuit Co. v. Philadelphia, 374 Pa. 604, 610)"

16. The learned Trial Judge erred in failing or refusing to affirm defendant's Twenty-second request for findings of fact, which request was as follows:

> 22. The defendant, National Biscuit Company, which was then and still is doing business in Philadelphia, filed a complaint in equity, in the Common Pleas Court of Philadelphia County, to enjoin the City of Philadelphia from levying the said tax upon the Company for the reason, among others, that the Company was subject to and required to pay to the Commonwealth of Pennsylvania for the privilege of doing business therein, a franchise tax under §§ 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, 72 P. S. 1871-1901, and that consequently the city's mercantile license fee and tax levy, as applied to National Biscuit Company, was not authorized by the Sterling Act but, on the contrary, was prohibited by such statute because, inter alia, complainant was subject to and paid the State Franchise Tax above mentioned. (Defendant's Exhibit No. 1—Record 6(a), 8(a), *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 610-611)"

17. The learned Trial Judge erred in failing or refusing to affirm defendant's Twenty-third request for findings of fact, which request was as follows:

> "23. In its briefs and arguments before the Supreme Court of Pennsylvania, National Biscuit Company strenuously argued that, being already subject to a State excise tax for the privilege of doing business known as the Foreign Franchise Tax, it could not, under the Sterling Act, be again subjected to an excise tax for the privilege of

doing business by the City of Philadelphia. (Defendant's Exhibit No. 1—Brief for Appellees, pages 30-31; Petition for Reargument, pages 1-3, 6-7)"

18. The learned Trial Judge erred in failing or refusing to affirm defendant's Twenty-fourth request for findings of fact, which request was as follows:

"24. The Supreme Court of Pennsylvania rejected the contention of National Biscuit Company on the ground that while the Philadelphia mercantile license tax is an excise tax, the State Franchise Tax on foreign corporations is in reality a property tax on the property of the corporation. (*National Biscuit Co. v. Philadelphia*, 374 Pa. 605, 612-614)"

19. The learned Trial Judge erred in failing or refusing to affirm defendant's Twenty-eighth request for findings of fact, which request was as follows:

"28. If the settlement in controversy should be corrected only to the extent of excluding, from the computation, defendant's investment in U. S. securities, the tax should be resettled in the amount of $50,080.27 computed as follows: $26,300,000 (total U. S. securities) over $186,117,884 (total assets less foreign subsidiaries) times $160,000,000 equals $22,609,331 (exempt capital stock value of U. S. securities). Subtracting the last figure from $160,000,000 (value of capital stock per settlement) results in adjusted capital stock value of $137,390,669, to which should be applied the composite allocation fraction or percentage shown in the settlement of .072902, thus producing a taxable value of $10,016,054.55 and applying thereto the tax rate of five mills.

results in a tax of $50,080.27, and a reduction in tax of $8,241.33, attributable to the exemption for investments in U. S. securities."

20. The learned Trial Judge erred in failing or refusing to affirm defendant's First request for conclusions of law, which request was as follows:

"1. The tax imposed on foreign corporations by the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462, hereinafter referred to as the Act of 1935 and Amendments, is a tax on defendant's capital stock and is by its incidence a property tax."

21. The learned Trial Judge erred in failing or refusing to affirm defendant's Third request for conclusions of law, which request was as follows:

"3. All of defendant's intangible assets, including its investments in stocks of subsidiary companies and in United States securities, are beyond the power and jurisdiction of Pennsylvania to levy a property tax thereon."

22. The learned Trial Judge erred in failing or refusing to affirm defendant's Fourth request for conclusions of law, which request was as follows:

"4. The statutory allocation fractions of tangible property, wages and gross receipts as provided for in the Act of 1935 and Amendments, when applied to defendant's entire capital stock value, do not determine the value of its property located in Pennsylvania. See *Com. v. Columbia Gas and Electric Corporation,* 336 Pa. 209, 221."

23. The learned Trial Judge erred in failing or refusing to affirm defendant's Fifth request for conclusions of law, which request was as follows:

> "5. The 'Francise Tax' settlement made against defendant for the year 1952 and the Act of 1935 and Amendments, if authorizing the said settlement, violate the due process and property clauses of Sections 1, 9 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that property tax is imposed therein on defendant's intangible and tangible property or assets located or having a situs outside of the Commonwealth of Pennsylvania."

24. The learned Trial Judge erred in failing or refusing to affirm defendant's Sixth request for conclusions of law, which request was as follows:

> "6. The 'Franchise Tax' settled against defendant for the year 1952, wherein tax is imposed on its property and assets, violates the uniformity of taxation provisions of Section 1 of Article IX of the Constitution of the Commonwealth of Pennsylvania and the equal protection of the laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions from taxation, particularly of United States securities and tangible property located outside of Pennsylvania, granted to domestic corporations in tax settlements on their capital stock, are denied to defendant, a foreign corporation."

25. The learned Trial Judge erred in failing or refusing to affirm defendant's Seventh request for conclusions of law, which request was as follows:

"7. The 'Franchise Tax' settled against defendant for the year 1952, wherein tax is imposed on its property and assets, violates Article VI, Clause 2 and Article I, Section 8, Clause 2, of the Constitution of the United States, in that tax is imposed in part upon defendant's investment in United States securities."

26. The learned Trial Judge erred in failing or refusing to affirm defendant's Eighth request for conclusions of law, which request was as follows:

"8. The tax imposed on foreign corporations, including the defendant, by the Act of 1935 and Amendments is the 'equivalent' of a property tax.

27. The learned Trial Judge erred in failing or refusing to affirm defendant's Ninth request for conclusions of law, which request was as follows:

"9. For the additional reason that the tax imposed by the Act of 1935 and Amendments is the 'equivalent' of a property tax, the 'Franchise Tax' settled against defendant for the year 1952 violates Article VI, Clause 2 and Article I, Section 8, Clause 2, of the Constitution of the United States, in that the incidence of the tax is in part upon defendant's investment in United States securities."

28. The learned Trial Judge erred in failing or refusing to affirm defendant's Tenth request for conclusions of law, which request was as follows:

"10. The 'Franchise Tax' settled against defendant for the year 1952, wherein tax is imposed on its property and assets, violates Section 3701 of the Revised Statutes of the United States, 31 U. S. C. Section 742, which generally exempts interest-bearing obligations of the United States from state and local taxation."

29. The learned Trial Judge erred in failing or refusing to affirm defendant's Eleventh request for conclusions of law, which request was as follows:

"11. For the additional reason that the tax imposed by the Act of 1935 and Amendments is the 'equivalent' of a property tax, the 'Franchise Tax' settled against defendant for the year 1952 violates Section 3701 of the Revised Statutes of the United States, 31 U. S. C., Section 742, which generally exempts interest-bearing obligations of the United States from state and local taxation, in that the incidence of the tax is in part upon defendant's investment in United States securities."

30. The learned Trial Judge erred in failing or refusing to affirm defendant's Twelfth request for conclusions of law, which request was as follows:

"12. To sustain the Act of 1935 and Amendments and the tax settlement made against defendant thereunder for the year 1952 as imposing a franchise or excise tax on defendant for the privilege of doing business in Pennsylvania and not a property tax, would be inconsistent with the decision of the Supreme Court of Pennsylvania in the case of *National Biscuit Company v. Philadelphia*, 374 Pa. 604 (National Biscuit Company, one of the appellees in that case is the same as the defendant in the present proceeding) and with similar prior decisions of that Court, and would, in such event and under such circumstances, violate the Pennsylvania and Federal Constitutions as follows:

(a) The due process and property clauses of Sections 1, 9 and 10 of Article I of the Constitution of Pennsylvania and of Section 1 of the Fourteenth

Amendment to the Constitution of the United States, in that such decision would be inconsistent with the above mentioned prior decision rendered against the defendant, would be arbitrary and unreasonable, and would deny defendant a reasonable adjudication of its rights.

(b) The uniformity clause of Section 1 of Article IX of the Constitution of Pennsylvania and the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions from taxation granted to domestic corporations in tax settlements on their capital stock would be denied to defendant, a foreign corporation, on the basis of semantics and of distinctions having no substance or reality."

31. The learned Trial Judge erred in failing or refusing to affirm defendant's Thirteenth request for conclusions of law, which request was as follows:

"13. Defendant's tax liability for the year 1952 under the Act of 1935 and Amendments, should be determined by eliminating in the tax computation any tax liability on defendant's tangible property located outside of Pennsylvania, its investments in United States securities and its other intangible assets."

32. The learned Trial Judge erred in failing or refusing to affirm defendant's Fourteenth request for conclusions of law, which request was as follows:

"14. Judgment should be entered in favor of the Commonwealth and against the defendant in the amount of Twenty-eight Thousand Six Hundred Seventy-one Dollars and one cent ($28,671.01), computed as set forth in defendant's

Request for Findings of Fact No. 26, which, having been overpaid, should be marked satisfied, and said judgment should order a credit of Twenty-nine Thousand Six Hundred Fifty Dollars and Fifty-nine cents ($29,650.59) to be entered in favor of defendant on the proper books and records of the Department of Revenue and the Department of the Auditor General."

33. The learned Trial Judge erred in failing or refusing to affirm defendant's Fifteenth request for conclusions of law, which request was as follows:

"15. If the tax settlement should be corrected only to the extent of excluding from the computation, defendant's investment in United States securities, judgment should be entered in favor of the Commonwealth and against the defendant in the amount of Fifty Thousand Eighty Dollars and Twenty-seven cents ($50,080.27), computed as set forth in defendant's Request for Finding of Fact No. 28, which, having been paid, should be marked satisfied, and said judgment should order a credit of Eight Thousand Two Hundred Forty-one Dollars and Thirty-three cents ($8,241.33) to be entered in favor of the defendant on the proper books and records of the Department of Revenue and the Department of the Auditor General."

34. The learned Trial Judge erred in failing or refusing to affirm defendant's Sixteenth request for conclusions of law, which request was as follows:

"16. The Board of Finance and Revenue erred in making the following decision:

'And now, to wit, March 17, 1954.

'This petition for review is refused and the action taken by the Department of Reve-

nue, approved by the Department of the Auditor General, is hereby sustained.' "

35. The learned Trial Judge erred in failing or refusing to affirm defendant's Seventeenth request for conclusions of law, which request was as follows:

"17. The appeal is sustained at the cost of the Commonwealth."

36. The learned Trial judge erred in entering the following judgment nisi:

"ORDER

AND Now, to-wit: April 12, 1956, the appeal is dismissed and judgment shall be entered in favor of the Commonwealth and against the defendant in the amount of $58,321.60, which judgment shall be marked satisfied upon payment of the costs, unless exceptions hereto be filed within thirty days hereof. The Prothonotary shall notify the parties or their counsel of this decree forthwith.

/s/ KARL E. RICHARDS,
President Judge Orphans' Court."

Respectfully submitted,

/s/ LESLIE M. SWOPE,
Leslie M. Swope,
DRINKER BIDDLE & REATH,
117 S. 17th Street,
Philadelphia 3, Pa.,

/s/ ROY J. KEEFER,
Roy J. Keefer,
HULL, LEIBY & METZGER,
208 Walnut Street,
Harrisburg, Pa.,
Attorneys for Defendant.

XI.

OPINION ON EXCEPTIONS.

By THE COURT:

The defendant has filed thirty-six exceptions to "the findings of fact, conclusions of law, opinion and judgment nisi of the court entered on April 12, 1956, and to the failure or refusal of the court to affirm defendant's requests for findings of fact and conclusions of law".

The first exception relates to our statement that to sustain the contention of the defendant "would reduce the tax to $27,373.30". This figure we correct to $28,671.01, in accordance with the amendment to the stipulation.

All of the other exceptions relate to questions which were fully argued originally and considered by the court. No good purpose would be served by discussing them. They may be reviewed on appeal.

Therefore, we affirm that the tax in question, so far as this case is concerned, is a franchise or excise tax for the privilege of doing business, and is not, for the present purposes, a property tax. We have corrected the figure complained of in Exception No. 1. Each and all of the other exceptions are dismissed.

XII.
FINAL JUDGMENT.

FINAL ORDER.

AND Now, to-wit: November 9, 1956 judgment is directed to be entered in accordance with our decree nisi.

/s/ KARL E. RICHARDS,
President Judge Orphans' Court.

XIII.

STATEMENT SERVED ON LOWER COURT UNDER RULE 43.

To Honorable Karl E. Richards:

Pursuant to Rule 43, printed above, you are hereby notified that on Nov. 29, 1956 an appeal was taken to the Supreme Court of Pennsylvania in the above entitled case at No. 25 May Term, 1957 by National Biscuit Company, and that appellant complains of the following matters, the reasons for which do not appear of record:

Statement of Matters Complained of

In its judgment nisi and final judgment in favor of the Commonwealth, and accompanying opinions, the lower court ruled that the so-called Pennsylvania Foreign Franchise Tax is an excise tax for the privilege of doing business in Pennsylvania, and consequently, that the measure of the tax is not limited to property having a situs in Pennsylvania; thereby deciding one of the issues raised by appellant in that court.

The appellant also contended in the lower court, both in its pleadings and in its written and oral arguments, (1) that even though the tax involved be deemed to be an excise tax for the privilege of doing business in Pennsylvania, under certain decisions of the Supreme Court of Pennsylvania, such decisions do not overrule or nullify other, and some more recent, decisions of the Supreme Court of Pennsylvania, which also hold that the said tax is a property tax or the equivalent of a property tax, and therefore, that the United States securities owned by appellant must at

least be excluded from the tax base in computing the tax, and (2) that a judicial determination in support of the Commonwealth in this case upon a theory of the tax which is inconsistent with that used by the Supreme Court of Pennsylvania in *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 98 Atl. 2d 182 (1953), involving the same taxpayer, which inconsistency necessarily results from the decision of the lower court appealed from in this case, constitutes an arbitrary and unconstitutional abuse of judicial power.

The lower court failed to discuss the two points last mentioned in its opinions accompanying the judgment nisi and the final judgment; and accordingly, the reasons for the court's judgment with respect thereto, do not appear of record.

These matters will constitute two of the principal issues raised by appellant on its appeal to the Supreme Court.

/s/ Roy J. Keefer,
Attorney for Appellant.

Nov. 29, 1956, Service of the foregoing notice is hereby accepted.

/s/ Karl E. Richards,
P. J. Orphans' Court.

XIV.

STIPULATION CONCERNING THE RECORD.

And Now, March 1, 1957, Counsel for National Biscuit Company, appellant, and Counsel for the Commonwealth of Pennsylvania, appellee, agree that, except for the Statement of general issues involved to be filed by Counsel for Appellee with the lower court, the foregoing shall constitute the entire printed Record in this case on appeal to the Supreme Court of Pennsylvania, entered at No. 25 May Term, 1957.

/s/ GEORGE W. KEITEL,
Counsel for Appellee.

/s/ ROY J. KEEFER,
Counsel for Appellant.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
MAY 9 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 990

NATIONAL BISCUIT COMPANY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

Appeal From the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

ROY J. KEEFER,
HULL, LEIBY AND METZGER,
208 Walnut Street,
Harrisburg, Pennsylvania,

LESLIE M. SWOPE,
DRINKER, BIDDLE & REATH,
1100 Philadelphia National Bank Building,
Philadelphia 7, Pennsylvania,
Attorneys for Appellant.

International, 711 So. 50th St., Phila. 43, Pa.

TABLE OF CONTENTS.

	Page
A. Opinions Below	1
B. Jurisdiction	2
C. Questions Presented	4
D. Statement of the Case	5
(1) The Statute	5
(2) History of the Case	6
(3) How the Federal Questions Were Raised	10
E. Federal Questions Are Substantial	13
(1) The Conflicting State Court Decisions Per Se Impinge on Federal Sovereignty	14
(2) The Conflicting State Court Decisions Discriminate Against Appellant and Its Investment in U. S. Securities	15
(3) The "Franchise" Tax in Reality Is a Property Tax	16
(4) The Enforcement Concurrently of Conflicting State Court Decisions as to the Nature of the Tax Is so Arbitrary and Unreasonable as to Violate Due Process	18
F. Conclusion	20
Appendix A—Text of Pennsylvania Statutes Involved	21
Section 20 of the Act of June 1, 1889, P. L. 420, as Last Amended by the Act of May 16, 1945, P. L. 606, 72 Purdon's Pennsylvania Statutes § 1901	21
Section 21 of the Act of June 1, 1889, P. L. 420, as Last Amended by the Act of May 29, 1951, P. L. 462, 72 Purdon's Pennsylvania Statutes § 1871	23
Appendix B—Copies of Opinions and Judgments Below	30
Commonwealth v. National Biscuit Company, Appellant, 390 Pa. 642; 136 A. (2d) 821	30
Chidsey Opinion	30
Bell Opinion	46

TABLE OF CONTENTS (Continued).

	Page
APPENDIX C—Petition for Reargument and Orders Entered in Supreme Court of Pennsylvania No. 25, May Term 1957 ..	50
Order Entered Granting Extension of Time to File Petition for Reargument	50
Petition of Appellant for Reargument (Filed Dec. 2, 1957)	50
Order Entered on Petition for Reargument	61
APPENDIX D—Relevant Parts of Opinions and Judgment Entered in Related Case of National Biscuit Co. v. Philadelphia, (Appeal No. 214), 374 Pa. 604, 98 A. 2d 182	62
Section 1 of the Act of August 5, 1932 Ex. Sess., P. L. 45, 53 Purdon's Pennsylvania Statutes § 4613, known as the "Sterling Act"	75
Relevant Provisions of Philadelphia City Ordinance Approved by Mayor Dec. 9, 1952	76

TABLE OF CASES CITED.

	Page
Arrott's Estate, 322 Pa. 367, 185 A. 697 (1936)	8, 15, 17
Bank of Commerce v. New York City, 2 Black 620, 67 U. S. 620 (1863)	17
Bank Tax Case, 2 Wall. 200, 69 U. S. 200 (1865)	17
Chicago, Burlington and Quincy Railroad Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581 (1897)	4, 19
Com. v. Columbia Gas & Electric Corporation, 336 Pa. 209, 8 A. 2d 404 (1939)	7
Com. v. Curtis Publishing Co., 363 Pa. 299, 69 A. 2d 410, cert. den. 339 U. S. 928, 70 S. Ct. 627 (1950)	16
Com. v. Ford Motor Co., 350 Pa. 236, 38 A. 2d 329 (1944) appeal dismissed, 324 U. S. 827	7
Com. v. Globe Furnishing Co., 324 Pa. 180, 188 A. 170 (1936)	18
Com. v. Mellon National Bank & Trust Co., 374 Pa. 519, 98 A. 2d 168, cert. den. 346 U. S. 875, 74 S. Ct. 127 (1953)	16
Com. v. Monessen Amusement Co., 352 Pa. 120, 42 A. 2d 158 (1945)	7
Com. v. Pennsylvania Railroad Co., 297 Pa. 308, 147 A. 242 (1929)	6
Com. v. Quaker Oats Co., 350 Pa. 253, 38 A. 2d 325 (1944) appeal dismissed, 324 U. S. 827, 65 S. Ct. 857	7
Com. v. Standard Oil Co., 101 Pa. 119 (1882)	6
Com. v. Union Trust Company of Pittsburgh, 345 Pa. 298, 27 A. 2d 15 (1942)	8, 9, 15
Delaware, Lackawanna and Western Railroad Co. v. Pennsylvania, 198 U. S. 341, 25 S. Ct. 669 (1905)	6, 17
Gelpcke v. City of Dubuque, 68 U. S. 175, 1 Wall. 175 (1863)	16
Kern-Limerick Inc. v. Scurlock, 347 U. S. 110, 74 S. Ct. 403 (1954)	14, 17
Ladner et al. v. Siegel, 298 Pa. 487, 148 A. 699 (1930)	19
Murray v. Philadelphia, 364 Pa. 157, 71 A. 2d 280 (1950)	8, 17
National Biscuit Company v. Philadelphia, 374 Pa. 604, 98 A. 2d 182 (1953)	2, 7, 8, 9, 10, 15, 19

TABLE OF CASES CITED (Continued).

Page

New Jersey Realty Title Insurance Co. v. Division of Tax Appeals of New Jersey, 338 U. S. 665, 70 S. Ct. 413 (1949) 3, 15

Ohio Tax Cases, 232 U. S. 576, 34 S. Ct. 372 (1914) 18

Santiago v. People of Puerto Rico, (C. C. A. First Circuit) 154 F. 2d 811 (1946) 4, 19

Schuylkill Trust Co. v. Pennsylvania, 315 Pa. 429, 173 A. 309, reversed, 296 U. S. 113, 56 S. Ct. 31 (1935) 3, 16

Schuylkill Trust Co. v. Pennsylvania, 327 Pa. 127, 193 A. 638, affirmed, 302 U. S. 506, 58 S. Ct. 295 (1938) 3, 16

Smith v. Davis, 323 U. S. 111, 65 S. Ct. 157 (1944) 14

Society for Savings in the City of Cleveland v. Bowers, 349 U. S. 143, 75 S. Ct. 607 (1955) 3, 15, 17

Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246 (1940) 17

STATUTES AND AUTHORITIES CITED.

Page

CCH State Tax Review, 11/18/57 bulletin 13

Pennsylvania Act of June 1, 1889, P. L. 420, Sections 20 and 21, as amended by the Act of May 16, 1935, P. L. 184, and further Amendatory Acts, (72 P. S. §§ 1901, 1871) ..2, 3, 4, 5, 6, 17

Pennsylvania Act of August 5, 1932, (Sterling Act) (53 P. S. § 4613) 7

Pennsylvania Fiscal Code, Section 1104 (72 P. S. § 1104) 2

United States Constitution:

Article I, Section 8, Clause 2 ..... 4, 5, 15, 18

Fourteenth Amendment:

Section 1; Due Process Clause 19

Section 1; Equal Protection Clause 15

United States Revised Statutes, Section 3701 (31 U. S. C. § 742) 4, 5, 18

IN THE

Supreme Court of the United States.

October Term, 1957

No.

NATIONAL BISCUIT COMPANY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

Appellant, National Biscuit Company, appeals from the judgment of the Supreme Court of Pennsylvania, entered on January 2, 1958, sustaining the inclusion of U. S. securities in the computation of a state tax imposed on foreign corporations; and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

A. OPINIONS BELOW.

The opinions of the Supreme Court of Pennsylvania are reported in 390 Pa. 642, 136 A. 2d 821 (November 11, 1957). Two opinions were handed down, both affirming the court below and sustaining the tax. Mr. Justice Cohen did not participate. One opinion of three justices, written by Justice Chidsey, sustained the tax as a privilege tax and at the same time retained in effect prior decisions holding the same tax to be a property tax. The concurring opinion

of the other three justices, written by Justice Bell, agreed that the tax is a privilege tax but would overrule prior decisions which had held the same tax to be a property tax. For convenience the two opinions are referred to hereinafter as the Chidsey Opinion and the Bell Opinion, respectively. These two opinions and the judgment of the state court are printed in Appendix B. The result of these opinions was to include appellant's investments in U. S. securities in the tax computation under the privilege tax theory and to leave in force and effect decisions of the state court holding the same tax to be a property tax.

The opinion of the trial court, Common Pleas of Dauphin County, Pennsylvania, dated April 12, 1956, containing its findings of fact, conclusions of law and judgment, is reported in 69 Dauphin County Reporter 35; and the opinion of that court en banc, sur exceptions filed, has not been reported. Both opinions are included at pages 133a and 156a of the printed Pennsylvania supreme court Record (hereinafter referred to as "R") filed herewith; and the first seventeen paragraphs of the Stipulation of Facts, incorporated in the trial court's opinion by reference, are also printed therein at pages 45a-50a.

The majority and dissenting opinions of the state court in a related case involving appellant (*National Biscuit Company v. Philadelphia*), in which the majority held the "Franchise" tax to be a property tax, are reported at 374 Pa. 604, 98 A. 2d 182 (1953) and relevant portions thereof are printed in Appendix D.

B. JURISDICTION.

The grounds, including the essential facts, on which the jurisdiction of this Court is invoked are:

(i) This action was brought by a foreign corporation under Section 1104 of the Fiscal Code of Pennsylvania, 72 Purdon's Statutes, § 1104, as an appeal from a tax imposed on foreign corporations under Sections 20 and 21(b)

of the Pennsylvania Act of June 1, 1889, P. L. 420, as amended, 72 Purdon's Statutes, §§ 1901 and 1871, to challenge, inter alia, the inclusion of U. S. securities in the capital stock value used as the basis of the tax. The nature of the tax is at issue, but for convenience it will sometimes be referred to herein as the "Franchise" tax.

(ii) The judgment of the Supreme Court of Pennsylvania was entered November 11, 1957, but did not become final for purpose of this appeal until January 2, 1958, when appellant's Petition for Reargument was denied.[1] Notice of appeal was filed on March 17, 1958, in the Supreme Court of Pennsylvania.

(iii) The statutory provisions conferring jurisdiction of the appeal on the Supreme Court of the United States are to be found in 28 U. S. C. §§ 1257(2), 2103, and 1257(3).

(iv) The following cases sustain the jurisdiction of the Supreme Court of the United States to review the judgment on appeal in this case:

Questions 1 and 3.

New Jersey Realty Title Insurance Co. v. Division of Tax Appeals of New Jersey, 338 U. S. 665, 70 S. Ct. 413 (1949).

Society for Savings in the City of Cleveland v. Bowers, 349 U. S. 143, 75 S. Ct. 607 (1955).

Question 2.

Schuylkill Trust Co. v. Pennsylvania, 315 Pa. 429, 173 A. 309, reversed, 296 U. S. 113, 56 S. Ct. 31 (1935).

Schuylkill Trust Co. v. Pennsylvania, 327 Pa. 127, 193 A. 638, affirmed, 302 U. S. 506, 58 S. Ct. 295 (1938).

---

1. Said petition was timely filed on December 2, 1957, under an extension granted by the Supreme Court of Pennsylvania on November 19, 1957. See Appendix C, p. 50.

Question 4.

Chicago, Burlington and Quincy Railroad Co. v. Chicago, 166 U. S. 226, 233-34, 17 S. Ct. 581 (1897).

Santiago v. People of Puerto Rico, (C. C. A. First Circuit) 154 F. 2d 811 (1946).

STATE STATUTE INVOLVED.

(v) The validity of the following Pennsylvania statute, as construed by the Supreme Court of Pennsylvania, is involved: Act of June 1, 1889, P. L. 420, Secs. 20 and 21, as amended by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last ones relevant hereto being the Acts of May 16, 1945, P. L. 606 and of May 29, 1951, P. L. 462, 72 Purdon's Statutes, §§ 1871 and 1901. The text of said Sections is set forth verbatim in Appendix A.

C. QUESTIONS PRESENTED.

1. Where the inclusion of U. S. securities in the computation of a state tax * imposed on appellant, a foreign corporation, for the year 1952, depends on whether the tax is a property tax or an excise tax for the privilege of doing business, can the state court in the present case, without violating the Credit Clause of the U. S. Constitution (Art. I, Sec. 8(2)) and Revised Statutes, § 3701, 31 U. S. C. § 742, uphold the inclusion of U. S. Securities on the ground that the tax is an excise tax and in the *same* case reaffirm other decisions of the *same* court holding that the *same* tax is a property tax for the purpose of determining *other exemptions* required by state law?

2. Are the appellant and its investments in U. S. securities discriminated against in violation of the Credit and Equal Protection Clauses (U. S. Const. Art. I, § 8(2) and XIV Amend.), when exemption for such investments is

* Imposed by Sec. 21(b) of the Pennsylvania Act of June 1, 1889, P. L. 420, as amended, the last relevant amending statute being the Act of May 29, 1951, P. L. 462, 72 Purdon's Statutes, § 1871.

allowed to domestic corporations for the purpose of the Capital Stock tax, a property tax, and similar exemption is denied to appellant by the state court for purposes of the so-called "Franchise" tax * in disregard of its other decisions holding that the "Franchise" tax is the equivalent of the Capital Stock tax?

3. In view of the conflicting decisions of the state court, concurrently in effect, as to the nature of the tax, is the tax * in substance and reality a property tax and therefore improperly imposed on appellant's investments in U. S. securities in violation of Revised Statutes, § 3701, 31 U. S. C. § 742, and Art. I, Sec. 8, Clause 2 of the U. S. Constitution?

4. Is the decision in this case, holding the tax * to be an excise tax, but at the same time reaffirming prior decisions (the latest one decided against the present taxpayer) holding the same tax to be a property tax, so arbitrary and unreasonable as to violate Due Process? (U. S. Const. XIV Amend.)

D. STATEMENT OF THE CASE.

(1) The Statute.

For nearly half a century prior to 1935, Section 20 of the Act of 1889, as amended, required domestic corporations and foreign corporations doing business in Pennsylvania to file annual tax reports and Section 21 imposed tax on "the actual value in cash" of their capital stock. This value was based upon the statutory tests of average selling price of shares on the market, earnings and dividends, and actual value of assets considering indebtedness, which tests were extended by judicial construction to in-

* Imposed by Sec. 21(b) of the Pennsylvania Act of June 1, 1889, P. L. 420, as amended, the last relevant amending statute being the Act of May 29, 1951, P. L. 462, 72 Purdon's Statutes, § 1871.

clude all factors having any bearing on value.[2] This tax was held to be a tax on property and assets—that on domestic corporations being a tax on all non-exempt property,[3] and that on foreign corporations being a tax only on *tangible* property located and employed in Pennsylvania.[4]

In the Amendatory Act of 1935 and subsequent amendatory acts, it is stated in the Title that a "Franchise" tax is imposed on foreign corporations in lieu of the capital stock tax theretofore imposed. Section 21(a) continues the tax unchanged on the capital stock of domestic corporations. Section 21(b) imposes on foreign corporations the so-called "Franchise" tax on the "taxable value" determined by ascertaining "the actual value in cash" of their whole capital stock *as theretofore* and by applying thereto certain allocation fractions known as tangible property, wages and gross receipts fractions. See Sections 20 and 21, as amended, Appendix A.

(2) History of the Case.

Appellant is a New Jersey corporation doing business in Pennsylvania and other states. During 1952, the tax year involved, its principal office was located at 449 West Fourteenth Street, New York City, where its principal officers performed their duties, and its executive, administrative and financial activities, including management and control, were centered. There, it also held, managed and controlled investments of $26,300,000 in U. S. securities.

Appellant, as a foreign corporation, is subject to tax imposed by Section 21(b) of the 1935 and subsequent amendatory acts. That section having been held in several decisions of the Supreme Court of Pennsylvania to impose

---

2. *Com. v. Pennsylvania Railroad Co.*, 297 Pa. 308, 147 A. 242 (1929).

3. *Delaware, Lackawanna and Western Railroad Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905).

4. *Com. v. Standard Oil Co.*, 101 Pa. 119 (1882).

a privilege tax,[5] appellant filed its 1952 tax return in March, 1953 (R. 46a) under that tax theory and in its self-assessment and payment of tax, it included its investments in U. S. securities in the "actual value in cash" of its capital stock. The apportionment formula applied thereto produced the "taxable value" which necessarily was made up in part of said U. S. securities to the extent of $1,648,265.45, thereby resulting in an additional tax of $8,241.33 attributable to the U. S. securities.[5a]

Subsequently, the City of Philadelphia imposed a so-called mercantile license tax on appellant, based upon its gross receipts, under an enabling act known as the Sterling Act (Act of August 5, 1932, Spec. Sess., P. L. 45, 53 Purdon's Statutes §4613) which by its terms prohibited the city from taxing any subject or privilege taxed by the state. Appellant challenged the local tax on the ground that it was an excise tax imposed on the privilege of doing business which constituted prohibited duplicate taxation of the state "Franchise" tax under the Act of 1889, as amended. On appeal by the city from a decision favorable to the appellant, the Supreme Court of Pennsylvania (two justices dissenting) reversed the lower court and held that the city tax is an excise tax, whereas the state tax is a property tax, so that the nature of each tax was different and, therefore, the city tax was valid under the enabling act: *National Biscuit Co. v. Philadelphia,* 374 Pa. 604, 98 A. 2d 182, (June 26, 1953). Relevant parts of the majority and

5. *Com. v. Columbia Gas & Electric Corporation,* 336 Pa. 209, 217, 8 A. 2d 404, 410 (1939); *Com. v. Ford Motor Co.,* 350 Pa. 236, 238, 38 A. 2d 329, 331 (1944) appeal dismissed, 324 U. S. 827; *Com. v. Quaker Oats Co.,* 350 Pa. 253, 256, 38 A. 2d 325, 327 (1944) appeal dismissed, 324 U. S. 827, 65 S. Ct. 857; *Com. v. Monessen Amusement Co.,* 352 Pa. 120, 42 A. 2d 158 (1945).

5a. Several issues were presented in the court below, but it was stipulated that if the court should adopt the theory that only U. S. securities should be excluded, then the record would be reopened to enable the court to enter judgment in the proper amount, which we have computed as above. Para. 18, R. 57a, 58a. Also see Appendix B herein at page 42, footnote 3.

dissenting opinions in that case, of the Sterling Act, and of the local ordinance, are printed in Appendix D herein.

Thereafter, the tax officials of Pennsylvania in November 1953 (R. 13a-15a) made formal assessment of "Franchise" tax against appellant on the theory that the tax was a privilege and not a property tax, thereby including appellant's investments in U. S. securities in the tax measure and tax computation. Thereupon, by appropriate proceedings in the present litigation, appellant protested the tax assessment and sought refund in the nature of a credit of that portion of the tax imposed on its investments in U. S. securities contending that if, as the State Supreme Court held in the *Philadelphia* case, the state tax is a property tax on corporate assets, then it could not be validly imposed upon U. S. securities.

Appellant also relied throughout the present litigation upon three other prior decisions of the State Supreme Court: the one[6] holding flatly that the "Franchise" tax is a property tax, and the other two[7] holding that the "Franchise" tax is the equivalent of the Capital Stock tax, admittedly a property tax, so that property taxation under a local ordinance or other state tax statutes of the shares or the income of foreign corporations constituted invalid double taxation of corporate property and assets already subjected to property taxation under the "Franchise" tax.

In the Supreme Court of Pennsylvania in the present case, the Chidsey Opinion (Appendix B, pp. 30-46), rejected this argument on the ground that the "Franchise" tax on foreign corporations is an excise tax for the privilege of doing business and, therefore, could be constitutionally measured by total capital stock value including U. S. securities. However, this Opinion refused to overrule prior

6. *Murray v. Philadelphia*, 364 Pa. 157, 174, 71 A. 2d 280 (1950).

7. *Com. v. Union Trust Company of Pittsburgh*, 345 Pa. 298, 307, 27 A. 2d 15, 19 (1942); *Arrott's Estate*, 322 Pa. 367, 373, 185 A. 697, 699 (1936).

decisons of the state court holding the same tax to be a property tax, with the attempted explanation that the state was not a party (although it actually was in the *Union Trust* case) to the cases in which it was held that the tax is a property tax and, further, that the tax could be regarded as a property tax for some purposes and in some contexts, without jeopardizing its holding that the tax is an excise tax for the purpose of taxing U. S. securities. The Chidsey Opinion also brushed aside as obiter dictum the court's unqualified statement in the *Philadelphia* case that the tax here involved is a property tax. The other opinion of three justices, the Bell Opinion (Appendix B, pp. 46-49) held that the two positions were fundamentally inconsistent and that the property tax decisions should be overruled. The Bell Opinion stated that the attempted explanation in the Chidsey Opinion that the court had consistently held the "Franchise" tax to be an excise tax "flies in the teeth of the more recent opinions and decisions of this Court which as above demonstrated held expressly, squarely and specifically to the contrary" (Appendix B, p. 48) and further: "How this Court can one moment say that a tax imposed by a certain State Act is a property tax, and the next moment say that it is a franchise tax, or vice versa, is to me incomprehensible; how this Court can then say that all the flatly contradictory and irreconcilable decisions of this Court on this point are harmonious and reconcilable, is to me incomprehensible; and finally, how this Court can reach its present conclusion (that the State franchise tax is a franchise tax, with which I agree) without overruling *National Biscuit Company v. Philadelphia,* 374 Pa., *supra,* and the recent cases which say exactly the opposite, is likewise incomprehensible" (Appendix B, p. 49).

Appellant's contention that these inconsistent decisions in and by themselves burden and discriminate against U. S. securities was rejected in the Chidsey Opinion on the ground that the tax was a privilege tax regardless of the court's

decisions in other cases that the tax was a property tax (Appendix B, pp. 33-43). The Bell Opinion was silent on this point. However, Justice Bell had expressed his views as to the use of different tests in different situations to determine the nature of the "Franchise" tax in his dissenting opinion in the *Philadelphia* case where he said (374 Pa. at p. 639, 98 A. 2d at p. 198; Appendix D, p. 75):

> "The effect of the majority opinion will, in my judgment, open wide the door to many taxes which have heretofore been held invalid and *will make meaningless and nullify many of the provisions of the Constitution.* For example, if the Constitution or a statute prohibits the taxing of a particular subject, all a municipality *or a legislature* has to do is to call the tax a mercantile license tax or an excise tax and then measure it by the prohibited subject. *Could anything show more clearly the basic weakness of the majority opinion or the dire results which can flow therefrom?*" (Emphasis supplied.)

Appellant's contention that the inconsistent decisions of the state court as to the nature of the tax violated appellant's constitutional rights of Due Process was rejected in the Chidsey Opinion on the ground that appellant had been given a hearing and the state court could change its decisions which had held the tax to be a property tax (Appendix B, pp. 45-46).

Appellant's Petition for Reargument, printed in Appendix C at pp. 50-61, which summarized its contentions as the result of the state court's decision and the divergent views of the justices thereof, was refused on January 2, 1958 without opinion; hence this appeal.

(3) How the Federal Questions Were Raised.

a. From the beginning of this litigation, the appellant has challenged the inclusion of U. S. securities in the tax base on the ground that, despite its being called a "Fran-

chise Tax," the tax here imposed is a property tax under the latest decisions of the state court and any decision, holding differently in this case without overruling contrary prior decisions, would violate the Borrowing, Equal Protection and Due Process Clauses of the Federal Constitution. This position of appellant was specifically maintained as follows:

(i) In its Appeal and Specification of Objections filed in the Court of Common Pleas of Dauphin County, Paragraphs 14(1), 14(2)(a),(b),(c) and (d), 14(3)(a), (b)—(R. 7a-10a).

(ii) In its Request for Conclusions of Law Nos. 7-11 filed with the trial court (R. 129a-130a), which were refused (R. 139a).

(iii) In its exceptions Nos. 6, 7, 8, 20-31 to the judgment nisi of the trial court (R. 142a, 143a, 149a-153a) which were dismissed by the trial court (R. 156a).

b. In its brief before the Supreme Court of Pennsylvania in the present case, the Questions Involved were stated as follows:

"1. Is the so-called Pennsylvania Franchise tax in reality a property tax and, therefore, improperly imposed upon Appellant's investments in (a) United States securities and (b) intangible or tangible property located or having a legal situs outside of Pennsylvania?

* * *

"2. Is the Franchise Tax 'equivalent' to a tax on property as such, so that in any event Appellant's investments in United States securities must be excluded from the computation of the tax?

* * *

"3. Does the Franchise Tax settlement discriminate against Appellant?

* * *

"4. If the tax, as-settled against Appellant, should be sustained in the litigation, will such judicial determination be so contrary to the decision of the Supreme Court of Pennsylvania in *National Biscuit Company v. Philadelphia,* 374 Pa. 604, involving the same taxpayer, that it will subject Appellant to taxation by arbitrary judicial action under two mutually exclusive constructions of the taxing statute, in violation of the State and Federal Constitutions?"

c. In its Petition for Reargument filed in the Supreme Court of Pennsylvania in the present case appellant summarized the grounds of its Petition as follows:

"I. By reaffirming the Court's prior decisions in *National Biscuit Co. v Philadelphia* and other cases relied upon by Appellant, the majority in effect holds that the so-called franchise tax is still a property tax for some purposes and in some contexts. This is enough to make the tax settlement invalid as applied to Federal securities owned by Appellant.

A. The inconsistent Opinions of the Court as to the nature of the franchise tax violate the immunity of Appellant's investment in United States securities from State taxation.

B. Discrimination against Appellant's investment in United States securities results from the Court's decision.

"II. The fact that the majority felt impelled to sustain the case of *National Biscuit Co. v. Philadelphia* shows that the Court was mistaken as to the single nature of the tax and the validity of including out of state assets comprised in part of United States securities.

"III. The concurring opinion of the minority Justices clearly shows that the majority opinion is mis-

taken as to the issue decided in *National Biscuit Co. v. Philadelphia,* and is still refusing to adjudicate consistently the nature of the franchise tax; and, therefore, is guilty of an abuse of judicial power, in violation of due process."

At each of the above stages of the litigation, the Court in its opinion, reached conclusions of law adverse to appellant's contentions. No issues of fact were involved.

E. FEDERAL QUESTIONS ARE SUBSTANTIAL.

This appeal presents a novel situation. In an opinion, which three justices describe as "incomprehensible" and which the editors of a national tax service describe as "a heads-we-win—tails-you-lose ruling," [8] the state court is concurrently enforcing conflicting decisions holding that the state tax based upon actual value of capital stock, is both a privilege tax (cases cited Note 5) and a property tax (cases cited Notes 6 and 7). Under the privilege tax theory, the tax is measured by the capital stock value and the incidence of the tax is on the privilege of doing business. Under the property tax theory, the incidence of the tax is on capital stock value representing corporate property and assets. When, in the instant case, appellant invokes the property tax decisions and theory, the state court adopts the privilege tax theory to include appellant's investments in U. S. securities in the tax computation; but three of the justices, questioning the constitutionality of enforcing conflicting state court decisions as to the nature of the tax, would overrule the property tax decisions.

Thus, this appeal raises serious and substantial Federal questions as to whether the conflicting state court decisions impinge on Federal sovereignty in respect to its credit and borrowing powers, burden and discriminate against U. S. securities, and violate appellant's constitutional rights un-

8. CCH State Tax Review 11/18/57 bulletin.

der Equal Protection and Due Process, and whether the tax is in reality a property tax.

(1) The Conflicting State Court Decisions Per Se Impinge on Federal Sovereignty.

These decisions are utterly lacking in logic and violate the fundamental principles distinguishing a privilege tax from a property tax. The "Franchise" tax is either one or the other; it cannot be both. As pointed out in the Bell Opinion in the present case, the conflicting decisions cannot be harmonized on the ground that the state is a party in some cases and not in others. The nature of the tax is not changed by the identity of the parties litigant. Basically, the real party in interest here is the United States, whose obligations are being subjected to tax.

The state court adopts either the privilege or the property tax theory as to the nature of the tax to meet the exigencies of the particular case. Not only the application but, also, the mere assertion, of the naked, arbitrary judicial power to change the nature of the tax at will, ignores "the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit" [9] and constitutes an interpretation of the tax statute by the state court intended "to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign" [10]—all of which impinges on Federal sovereignty in respect to credit and borrowing power. So long as the state court, in the instant case and in the case of foreign corporations generally, interprets the tax statute as imposing a privilege tax, thereby subjecting U. S. obligations to taxation, and asserts also that the same tax is a property

9. *Smith v. Davis*, 323 U. S. 111, 117, 65 S. Ct. 157 (1944).

10. *Kern-Limerick Inc. v. Scurlock*, 347 U. S. 110, 121, 74 S. Ct. 403 (1954).

tax, such decision violates the immunity of U. S. securities from state taxation.[11]

(2) The Conflicting State Court Decisions Discriminate Against Appellant and Its Investment in U. S. Securities.

Discrimination against appellant and its investments in U. S. securities, in violation of Equal Protection Clause (XIV Amend.) and Credit Clause (Art. 1, Sec. 8 (2)) of the U. S. Constitution, arises in the present case under these circumstances:

a. If, for the purpose of determining whether a tax under a local ordinance duplicates the "Franchise" tax, the latter is held to be a property tax,[12] or, if for the purpose of exempting shares of foreign corporations from tax under other state tax statutes in order to avoid double taxation, the "Franchise" tax is held to be the equivalent of the capital stock tax,[13] the state court cannot arbitrarily take a *different* view in the present case for the purpose of denying the immunity of appellant's investments in U. S. securities from state taxation.

b. Exemption from capital stock tax is allowed for U. S. securities owned by domestic corporations (R. 48a, 49a), but the state court refuses to apply its decisions holding that the "Franchise" tax is the equivalent of the capital stock tax and to allow a similar exemption for U. S. securities owned by appellant and other foreign corporations.

---

11. *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals of New Jersey*, 338 U. S. 665, 70 S. Ct. 413 (1949); *Society for Savings in the City of Cleveland v. Bowers*, 349 U. S. 143, 75 S. Ct. 607 (1955).

12. *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 98 A. 2d 182 (1953).

13. *Com. v. Union Trust Company of Pittsburgh*, 345 Pa. 298, 27 A. 2d 15 (1942); *Arrott's Estate*, 322 Pa. 367, 185 A. 697 (1936).

The state court decision in the present case, rejecting appellant's contention as to discrimination, was based upon its earlier decisions holding the "Franchise" tax to be a privilege tax (cases cited Note 5) which were prior in point of time to its later decisions holding the same tax to be a property tax (cases cited Notes 6 and 7).

This Court has affirmed or decided that U. S. securities have been discriminated against when the State exempts, even from a "privilege" tax, interest from municipal obligations and denies a similar exemption to interest from U. S. securities;[14] when for purposes of tax on bank shares, exemption is allowed for certain bank investments and a similar exemption is denied for the bank's investment in U. S. securities;[15] and when, in computing tax on shares of state trust companies exemption is allowed for investment in U. S. securities and other investments and a similar exemption is denied to national banks for investments in U. S. securities in the computation of tax on their shares under a different state tax statute.[16] These decisions support our contention of discrimination in the present case.

(3) The "Franchise" Tax in Reality Is a Property Tax.

Where the state court cannot reach a settled conclusion involving the construction of a state statute, this Court has said in *Gelpcke v. City of Dubuque*, 68 U. S. 175 (1863) at page 205:

> "It cannot be expected that this Court will follow every such oscillation from whatever cause arising that may possibly occur."

---

14. *Com. v. Curtis Publishing Co.*, 363 Pa. 299, 69 A. 2d 410 cert. den., 339 U. S. 928, 70 S. Ct. 627 (1950).

15. *Schuylkill Trust Co. v. Pennsylvania*, 315 Pa. 429, 173 A. 309 reversed, 296 U. S. 113, 56 S. Ct. 31 (1935); *Schuylkill Trust Co. v. Pennsylvania*, 327 Pa. 127, 193 A. 638 affirmed, 302 U. S. 506, 58 S. Ct. 295 (1938).

16. *Com. v. Mellon National Bank & Trust Co.*, 374 Pa. 519, 98 A. 2d 168 cert. den., 346 U. S. 875, 74 S Ct. 127 (1953).

Under these circumstances, this Court has held that, in judging the constitutional right of a state to impose a tax, it is not limited by the state's characterization of the tax [17] and, further, that it is its duty "to decide for itself facts or constructions upon which federal constitutional issues rest." [18]

Despite the change in the nomenclature of the tax on foreign corporations from a capital stock tax to a "Franchise" tax, the tax still remains a tax on their property and assets represented by the actual value in cash of their capital stock:

a. The tax is imposed "upon a taxable value".

b. The tax is based upon the appraisal of capital stock "at its actual value in cash" which has been held to represent property and assets; [19] and this Court has held that a tax upon a corporation's capital "at a valuation" is of necessity a tax upon the property in which the capital has been invested. [20]

c. In applying the realities test in respect to the practical operation of the tax, the state court has found that the "Franchise" tax *is a part of the system* taxing the capital stock of corporations and that it "was obviously devised to reach the property of foreign corporations as the equivalent of the capital stock tax". [21]

d. Section 21(a) and (b) of the tax statute refers to future exemption from tax of "capital stock of cor-

17. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 443, 61 S. Ct. 246 (1940); *Society for Savings in the City of Cleveland v. Bowers*, 349 U. S. 143, 75 S. Ct. 607 (1955).

18. *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, 121, 74 S. Ct. 403 (1954).

19. *Delaware, Lackawanna & Western Railroad Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905).

20. *Bank of Commerce v. New York City*, 2 Black 620, 67 U. S. 620 (1863); *Bank Tax Case*, 2 Wall. 200, 69 U. S. 200 (1865).

21. *Murray v. Philadelphia*, 364 Pa. 157, 170, 71 A. 2d 280 (1950); *Arrott's Estate*, 322 Pa. 367, 371, 185 A. 697 (1936).

porations * * * organized * * * for manufacturing purposes". This reference, of necessity, must apply to the capital and assets of foreign corporations and not to their privilege to do business in Pennsylvania.

c. Section 21(c) of the tax statute provides that domestic and foreign corporations liable for tax under Section 21 "shall not be required to pay any *further* tax on mortgages, bonds and other securities owned by them". (Emphasis supplied). Since the tax on the capital stock of domestic corporations is a property tax, it is obvious that the "Franchise" tax on foreign corporations is likewise a tax on property, otherwise another property tax on mortgages, etc. owned by the foreign corporations would not be a *further* tax. This proviso discloses the legislative intent to avoid double taxation of the *same property* and there is no double taxation, in the accepted legal sense, if the "Franchise" tax is on a privilege and another tax is on property.[22]

These points reveal clearly that the incidence of the "Franchise" tax is on property and assets and not on the privilege of doing business, and, therefore, the tax violates the credit clause of the U. S. Constitution and Revised Statutes § 3701.

(4) The Enforcement Concurrently of Conflicting State Court Decisions as to the Nature of the Tax Is so Arbitrary and Unreasonable as to Violate Due Process.

The net result of the state court decision in the instant case is to enforce the "Franchise" tax as a privilege tax on all foreign corporations and not to overrule, but to affirm, other state court decisions holding the same tax to be a property tax.

---

22. *Ohio Tax Cases*, 232 U. S. 576, 593, 594, 34 S. Ct. 372 (1914); *Com. v. Globe Furnishing Co.*, 324 Pa. 180, 183, 188 A. 170 (1936).

It is true that due process does not require judicial interpretation of a tax statute to remain unchanged but it is still necessary that interpretations enforced concurrently be consistent.

It is well settled that the prohibition of the Fourteenth Amendment (U. S. Const.) applies to arbitrary action by the judiciary.[23] Likewise, it is well established that the test of due process is essentially a test of reasonableness.[24]

The right asserted by appellant in the present case is reasonable adjudication of its tax liability and protection against arbitrary action. Since the state court in the present case has sustained the "Franchise" tax as a privilege tax, which is directly opposed to its ruling in the *Philadelphia* case against the same taxpayer and also in prior cases (Notes 6 and 7), that the "Franchise" tax is a property tax, we are concerned here with *concurrent simultaneous opposite views of the court,* each impeaching the logic of the other but neither overruling the other. Such a situation, it is respectfully submitted, does not constitute reversal of prior decisions, mere error, or change by judicial construction but instead constitutes intentional rulings without justification, based on expediency or the exigencies of the particular case rather than on sound principles. The Bell Opinion supports these views.

Such enforcement by the state court of concurrently conflicting decisions violates the constitutional rights under Due Process of all foreign corporations subject to the "Franchise" tax statute, as well as appellant.

---

23. *Chicago, Burlington and Quincy Railroad Co. v. Chicago,* 166 U. S. 226, 233-234, 17 S. Ct. 581 (1897); *Ladner et al. v. Siegel,* 298 Pa. 487, 148 A. 699 (1930).

24. *Santiago v. People of Puerto Rico,* (C. C. A. First Circuit) 154 F. 2d 811 (1946).

F. CONCLUSION.

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal; that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution; and that, if the appeal should be considered as having been improvidently taken, the Court should consider it as a petition for certiorari; and appellant prays that final judgment of the Supreme Court of Pennsylvania be reversed and for such other relief as may be fit and proper.

ROY J. KEEFER,
HULL, LEIBY AND METZGER,
208 Walnut Street,
Harrisburg, Pennsylvania,

LESLIE M. SWOPE,
DRINKER, BIDDLE & REATH,
1100 Philadelphia National Bank Building,
Philadelphia 7, Pennsylvania.
Attorneys for Appellant.

APPENDIX A.

TEXT OF PENNSYLVANIA STATUTES INVOLVED.

Section 20 of the Act of June 1, 1889, P. L. 420, as Last Amended by the Act of May 16, 1945, P. L. 606, 72 Purdon's Pennsylvania Statutes § 1901.

Section 20. That hereafter, except in the case of corporations of the first class, nonprofit corporations, and cooperative agricultural associations not having capital stock and not conducted for profit, banks, savings institutions, title insurance, or trust companies, building and loan associations, and foreign insurance companies, it shall be the duty of every corporation having capital stock, every joint-stock association, limited partnership, and every company whatsoever, now or hereafter organized or incorporated by or under any laws of this Commonwealth, and of every corporation, joint-stock association, limited partnership, and company whatsoever, now or hereafter incorporated or organized by or under the law of any other State or Territory of the United States, or by the United States, or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of any limited partnership or joint-stock association, company, or corporation whatsoever, association or associations, copartnership or copartnerships, person or persons, or in any other manner, to make annually on or before the fifteenth day of March, for the calendar year next preceding, a report in writing to the Department of Revenue on a form or forms to be prescribed and furnished by it, setting forth, in addition to any other information required by the Department of Revenue:

First. The amount of its capital stock at the close of the year for which report is made, together with the highest selling price per share, and the average selling price thereof during said year.

Second. Its debt account.

Third. Its income account, together with the disposition of any net income, and its profit and loss statement.

Fourth. Its general balance sheet.

Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and value of the same; and the value of the property, if any, exempt from taxation.

Sixth. A valuation and appraisal, in the manner hereinafter provided, of the capital stock of the said corporation, company, joint-stock association, or limited partnership, at its actual value in cash as it existed at the close of the year for which the report is made.

The affidavit of two of the officers of such corporation, limited partnership, joint-stock association or company, shall be attached to said report. Such affidavit shall be in the form required by the Department of Revenue, but shall state, in addition to any other averments required by the department, that, with fidelity and according to the best of their knowledge and belief, the affiants have estimated, valued and appraised, as shown in said report, the capital stock of the said corporation at its actual value in cash as it existed at the close of the year for which report is made; taking into consideration, first, the average which said stock sold for during the year; and second, the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends, expended in betterments, or carried into the surplus or sinking fund; and third, the actual value indicated or measured by consideration of the intrinsic value of its tangible property and

assets, and of the value of its good will and franchises and privileges, as indicated by the material results of their exercise, taking also into consideration the amount of its indebtedness.

The time for filing reports may be extended; taxpayers may be permitted to file their reports on a fiscal year basis; the procedure in case the Department of Revenue is not satisfied with the appraisement made by the officers of the taxpayer, and the penalties for failing to file reports and pay taxes shall be as prescribed by law.

* * *

Section 21 of the Act of June 1, 1889, P. L. 420, as Last Amended by the Act of May 29, 1951, P. L. 462, 72 Purdon's Pennsylvania Statutes § 1871.

Section 21. (a) That every domestic corporation other than corporations of the first class, nonprofit corporations, and cooperative agricultural associations not having capital stock and not conducted for profit, and every joint-stock association, limited partnership, and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to, and pay into the treasury of the Commonwealth annually, through the Department of Revenue, a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special, and preferred, as ascertained in the manner prescribed in said twentieth section: Provided, That the tax of five mills imposed by this sub-section on reports filed for the calendar years one thousand nine hundred forty-seven, one thousand nine hundred forty-eight, one thousand nine hundred forty-nine, one thousand nine hundred fifty, one thousand nine hundred fifty-one, and one thousand nine hundred fifty-two, or for the fiscal years beginning in the calendar years one thousand nine hundred forty-seven, one thousand nine hundred forty-eight, one thousand nine hundred forty-nine, one thousand nine hundred fifty, one thou-

sand nine hundred fifty-one, and one thousand nine hundred fifty-two, shall apply to the taxation of capital stock of corporations, limited partnerships and joint-stock associations organized for manufacturing purposes, excepting companies engaged in the distilling of liquors: Provided, further, That after said six year period the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships and joint-stock associations organized for manufacturing purposes, which is invested in and actually and exclusively employed in carrying on manufacturing within the State, excepting companies engaged in the distilling of liquors and such as enjoy and exercise the right of eminent domain, but every corporation, limited partnership or joint-stock association organized for the purpose of manufacturing shall pay the State tax of five mills herein provided, upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to the manufacturing business, in addition to the local taxes assessed upon its property in the district where located, it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the manufacturing plant and business.

(b) Every foreign corporation, joint-stock association, limited partnership, and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth annually, through the Department of Revenue, a franchise tax at the rate of five mills upon a taxable value to be determined in the following manner. The actual value of its whole capital stock of all kinds, including common, special, and preferred, shall be ascertained in the manner prescribed in the twentieth section of this act, and shall then be divided into three equal parts.

(1) Of one third, such portion shall be attributed to business carried on within the Commonwealth, as shall be

found by multiplying said third by a fraction, whose numerator is the value of the taxpayer's tangible property not actually and exclusively used in manufacturing, situated within the Commonwealth, and whose denominator is the value of all the taxpayer's tangible property wherever situated.

(2) Of another third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the expenditures of the taxpayer for wages, salaries, commissions, or other compensation to its employes not exclusively engaged in manufacturing in this Commonwealth and assignable to this Commonwealth as hereinafter provided, and whose denominator is the total expenditures of the taxpayer for wages, salaries, commissions, or other compensation to all its employes.

(3) Of the remaining third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the amount of the taxpayer's gross receipts from business not strictly incident or appurtenant to manufacturing in this Commonwealth assignable to this Commonwealth as hereinafter provided, and whose denominator is the amount of the taxpayer's gross receipts from all its business.

The sum of the amounts, determined in accordance with the foregoing three rules, shall be the taxable value. In a case where only two of the foregoing three rules are applicable, the remaining third equal part of the value of the entire capital stock shall be divided into two equal parts, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of the three rules is applicable, that part of the entire capital stock attributed to business carried on within the Commonwealth shall be determined solely by that rule.

The amount assignable to this Commonwealth of expenditures of the taxpayers for wages, salaries, commissions, or other compensation to its employes, shall be such expenditures for the taxable year as represent the wages, salaries, commissions, or other compensation of employes not chiefly situated at, connected with, or sent out from premises for the transaction of business maintained by the taxpayer outside the Commonwealth.

The amount of the taxpayer's gross receipts from business assignable to this Commonwealth shall be, (1) the amount of its gross receipts for the taxable year, except those negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business maintained by the taxpayer outside the Commonwealth, and except rents and royalties, and interest and dividends, (2) rentals or royalties from property situated or from the use of patents within this Commonwealth, and (3) dividends and interest, except such dividends and interest attributable to the business conducted on premises maintained by the taxpayer outside the Commonwealth. If a taxpayer maintains an office, warehouse, or other place of business in a state other than this Commonwealth for the purpose of reducing its tax under this subsection, the Department of Revenue shall, in determining the amount of its gross receipts from business assignable to this Commonwealth, include therein the gross receipts attributed by the taxpayer to the business conducted at such place of business in another state.

In the case of construction contracts negotiated or effected at an office in the State of Pennsylvania, but performed outside the State, the gross receipts under such contracts shall be assignable outside the State, except that if the activities under any such contract to which the gross receipts are attributable shall occur partly within the State and partly outside the State, such proportion of the gross receipts under said contract shall be assignable to Pennsyl-

vania as the direct and indirect costs incurred in Pennsylvania under the contract for the taxable year bear to the total costs incurred thereunder for the taxable year. In the case of construction contracts negotiated or effected at an office outside the State, but performed in the State, the gross receipts under such contract shall be assignable to the State, except that if the activities under any such contract to which the gross receipts are attributable shall occur partly within the State and partly outside the State, such proportion of the gross receipts under said contract shall be assignable to Pennsylvania as the direct and indirect costs incurred in the State under the contract for the taxable year bear to the total cost incurred thereunder for the taxable year.

A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditures of a taxpayer for wages, salaries, commissions, or other compensation, or the gross receipts of the taxpayer are found to be situated, incurred, or received without the Commonwealth.

Notwithstanding the foregoing provisions of this subsection (b), the franchise tax of five mills imposed by subsection (b) on reports filed for the calendar years one thousand nine hundred forty-seven, one thousand nine hundred forty-eight, one thousand nine hundred forty-nine, one thousand nine hundred fifty, one thousand nine hundred fifty-one, and one thousand nine hundred fifty-two, and for fiscal years beginning in the calendar years one thousand nine hundred forty-seven, one thousand nine hundred forty-eight, one thousand nine hundred forty-nine, one thousand nine hundred fifty, one thousand nine hundred fifty-one, and one thousand nine hundred fifty-two shall apply to the taxation of corporations, limited partnerships and joint-stock associations organized for manufacturing purposes, excepting companies engaged in the distilling of liquors, without excluding from the numerators of the applicable fractions tangible property actually and exclusively used in manufacturing, compensation of employes exclusively engaged in

manufacturing, and gross receipts from business strictly incident or appurtenant to manufacturing.

After said six year period the provisions of this subsection shall apply to the taxation of corporations, limited partnerships and joint-stock associations organized for manufacturing purposes.

(c) It shall be the duty of the treasurer or other officers having charge of any such corporation, joint-stock association, or limited partnership, upon which a tax is imposed by this section, to transmit the amount of said tax to the Treasury of the Commonwealth within the time prescribed by law: Provided, That for the purposes of this act, interest in limited partnerships or joint-stock associations shall be deemed to be capital stock, and taxable accordingly: Provided further, That corporations, limited partnerships, and joint-stock associations, liable to a tax under this section, shall not be required to pay any further tax on the mortgages, bonds, and other securities owned by them and in which the whole body of stockholders or members, as such, have the entire equitable interest in remainder; but corporations, limited partnerships, and joint-stock associations, owning or holding such securities as trustees, executors, administrators, guardians, or in any other manner than for the whole body of stockholders or members thereof as sole equitable owners in remainder, shall return and pay the tax imposed by this act upon all securites so owned or held by them, as in the case of individuals: Provided further, That the tax of five mills, imposed by this section on reports filed for the calendar years one thousand nine hundred and thirty-five and one thousand nine hundred and thirty-six, and for each calendar year thereafter, or for the fiscal years beginning in the calendar years one thousand nine hundred and thirty-five and one thousand nine hundred and thirty-six, and for each fiscal year thereafter, shall apply to the taxation of the capital stock of corporations, limited partnerships, and joint-stock associations, organ-

ized for laundering and for the processing and curing of meats, their products and by products, excepting companies engaged in the distilling of liquors: Provided further, That in case of fire and marine insurance companies, the tax imposed by this section shall be at the rate of five mills upon each dollar of the actual value of the whole capital stock: Provided, That nothing in this act shall be so construed as to apply to building and loan associations chartered by the State of Pennsylvania.

* * *

APPENDIX B.

COPIES OF OPINIONS AND JUDGMENTS BELOW.

(As reported in 390 Pa. 642; 136 A. (2d) 821: headnotes and names of counsel omitted.)

Commonwealth v. National Biscuit Company, Appellant.

Argued May 27, 1957. Before JONES, C. J., BELL, CHIDSEY, MUSMANNO, ARNOLD and JONES, JJ.

Appeal, No. 25, May T., 1957, from judgment of Court of Common Pleas of Dauphin County, No. 59, Commonwealth Docket, 1954, in case of Commonwealth of Pennsylvania v. National Biscuit Company. Judgment affirmed; reargument refused January 2, 1958.

Appeal by taxpayer from decision of the Board of Finance and Revenue refusing petition for review of franchise tax settlement. Before RICHARDS, P. J., NEELY, SOHN, and KREIDER, JJ.

Adjudication filed finding for plaintiff, defendant's exceptions to adjudication dismissed, and final judgment entered. Defendant appealed.

OPINION BY MR. JUSTICE CHIDSEY, November 11, 1957:

This appeal by National Biscuit Company questions the amount of State tax imposed on it for the year 1952 under the Act of May 16, 1935, P. L. 184, which imposes a franchise tax on foreign corporations doing business in Pennsylvania.

Appellant was incorporated in New Jersey, has its principal office in New York City and is duly registered to do business in Pennsylvania where during the tax year in question it engaged in its business of the manufacture and sale of bakery products. Following the filing of its franchise tax report for said year and in conformity therewith,

the tax payable by appellant was settled by the fiscal officers of the Commonwealth in the amount of $58,321.60. A petition for resettlement was refused. Appellant paid the tax but filed a petition for review with the Board of Finance and Revenue which was denied and the tax settlement sustained. On appeal, the Dauphin County Court (four judges sitting) upheld the action of the tax authorities and entered judgment nisi in favor of the Commonwealth and against appellant in the said amount of $58,321.60 (to be marked satisfied upon payment of costs). After consideration of exceptions filed, the court entered a final judgment affirming its judgment nisi. This appeal followed.

Appellant's contention will be better understood by a preliminary reference to the tax legislation involved. Prior to the enactment of the Franchise Tax Act of 1935, both domestic and foreign corporations were subject to the Capital Stock Tax Act of June 1, 1889, P. L. 420, which, as repeatedly held by this Court, imposed a tax on property. Therefore, in the case of foreign corporations there was taxed only so much of the corporation's capital stock as the ratio of tangible assets within the Commonwealth bore to all of the assets of the foreign corporation wherever situated. This worked an unfair discrimination in favor of foreign corporations against domestic corporations (see *Commonwealth v. Columbia Gas and Electric Corporation*, 336 Pa. 209, at p. 215, 8 A. 2d 404), which was remedied by abandonment of the capital stock tax as to foreign corporations and the imposition of a franchise tax in its stead. This was accomplished by amendment to the Capital Stock Tax Act of 1889: (See 72 PS § 1871 for the Act of 1889 as amended by the Act of 1935). The amendatory Act of 1935 is entitled "An Act to further amend . . . by substituting a franchise tax on foreign corporations in lieu of the capital stock tax on such corporations". The new tax thus imposed on foreign corporations is, as termed in the title and in the body of the amendatory Act, a "franchise tax", i.e.,

a tax on the privilege of doing business in the Commonwealth as we have frequently stated. In order to determine the value of the exercise of this privilege conferred by the Commonwealth, the Franchise Tax Act provides a formula for the ascertainment of the corporation's activities within the State. The business transacted in the State is measured through allocation fractions involving the proportion which the tangible property in the State, the payroll in the State and the gross receipts in the State respectively bear to the total assets, payroll and gross receipts of the corporation. It is unnecessary to set forth in detail the factors composing the formula. They were discussed at length in the *Columbia Gas* case, 336 Pa., supra (see p. 214 et seq.) and in *Commonwealth v. Ford Motor Company,* 350 Pa. 236, (see p. 240 et seq.), 38 A. 2d 329 and the formula approved as a reasonable measure of value.

In accordance with the formula and as required thereunder for the determination and application of the allocation fractions necessary for the computation of the tax, the taxing departments in appraising appellant's entire capital stock included all of the defendant's tangible and intangible assets as listed in the balance sheet contained in its Franchise Tax Report for 1952, excepting its investment in shares of stock of subsidiary companies operating in foreign countries which, together with the income derived therefrom, was excluded; this exclusion is not in issue. Claiming that the tax in question is a property tax and therefore extraterritorial assets of the corporation may not be included in arriving at the taxable valuation, appellant asserts that the formula or method applicable under the Capital Stock Tax Act should be applied to it. By stipulation it was agreed that under the formula prescribed by the Franchise Tax Act the taxable valuation is $11,664,320, and the resulting tax $58,321.60 as settled; that if, as claimed by appellant, the method or formula used in settling capital stock tax against appellant prior to the enactment

of the Franchise Tax Act were applied, the taxable valuation would be $5,734,202 and the tax thereon $28,671.01 which, since the tax as settled in the amount of $58,321.60 was paid, would entitle appellant to a credit of $29,650.59.

Appellant contends that the tax as computed and imposed on it offends various provisions of the State and Federal Constitutions. The contention rests upon the premise or assumption that the Franchise Tax Act of 1935 imposed a property tax. In cases decided by this Court following the passage of the Act of 1935 we unequivocally and repeatedly held that the franchise tax imposed by it is not a property tax but, as its name implies, a tax levied for the privilege of doing business in the Commonwealth, and its constitutionality was upheld: *Commonwealth v. Columbia Gas and Electric Corporation*, supra (1939); *Commonwealth v. Ford Motor Company*, supra (1944); *Commonwealth v. Quaker Oats Company*, 350 Pa. 253 (1944), 38 A. 2d 325; *Commonwealth v. Monessen Amusement Company, Inc.*, 352 Pa. 120 (1945), 42 A. 2d 158. The constitutional attacks upon the Act rested then, as they do now, upon the contention that the tax imposed by it is a property tax.

In *Commonwealth v. Columbia Gas and Electric Corporation*, supra, in which the constitutionality of the Franchise Tax Act was upheld in the first judicial interpretation of the tax, this Court said at p. 217 et seq.: "Did the legislature intend to change its old policy of levying a property tax and create in its stead a franchise tax upon foreign corporations? *We concur with the court below in its conclusion that the tax is a franchise tax and not a property tax.* The legislature in the title to the act called it a franchise tax. While not conclusive, some weight should be given to this designation in determining the nature of the tax. . . . Whether this is a property tax or a franchise tax rests to some extent upon the method of its ascertainment and the incidence of the tax itself. Where a tax is imposed directly on specific property, it is a property tax. *The*

incidence of a franchise or privilege tax is upon a franchise or privilege and not upon property or capital. . . .

"Among the standards used for distinguishing a franchise tax from a property tax has been the method adopted for laying them and fixing the amount. . . . The determination of the value of the franchise under the amendatory Act may bring into consideration property situated within the Commonwealth, and give to it a functional value as part of an organic unit. *But the incidence of the tax is fixed upon the value of the franchise; not upon the property itself.* To ascertain that taxable value there must, of course, be a method.

"Under the 1935 Act, the underlying element in the ascertainment of the value of the franchise is the value of the entire capital stock of each foreign corporation. We referred to this in Arrott's Estate, 322 Pa. 367, as being the base. The attempt to determine what part of the value of this base should be the taxable value called for by the Act is to ascertain with approximate correctness the equivalence of that value which the legislature deemed the franchise or right to do business in this State to have." (Emphasis supplied).

In *Commonwealth v. Ford Motor Company,* supra (appeal dismissed 324 U. S. 827), at p. 240 et seq. we said: ". . . This Act imposes a *franchise or excise* tax upon foreign corporations as distinguished from a property or ad valorem tax. Prior to 1935, foreign corporations doing business here were required to pay a capital stock tax, which, as a property tax, proved unsatisfactory and produced unfair results. As we stated in Arrott's Estate, 322 Pa. 367, 372, 185 A. 697, the Act of 1935, by changing the incidence of the foreign corporation tax, endeavored to achieve a more equitable measurement of taxation for this class of corporation. It accomplished this by imposing a franchise tax not *upon* capital stock but *measured* by capital stock. The tax base was determined, not by the allocation to Pennsylvania of an arbitrary percentage of the total

capital stock of the corporation, but, through the use of a tripartite formula, by ascertaining, insofar as possible, the relation of the corporate activities in this State to the activities of the corporation everywhere. In the Columbia Gas and Electric Corp. case, supra, at page 216, we said: 'The tax base represents the value of [the] right to do business in this State.' . . . (Emphasis the Court's).

"In the Columbia Gas and Electric Corp. case, supra, we held that the tax, *not being a property tax, but a tax upon the privilege of engaging in business in this Commonwealth*, should be measured by a valuation reflecting capital so used as to affect the value of the Pennsylvania franchise, rather than a valuation reflecting merely aggregate capitalization. . . ." (Emphasis supplied).

In *Commonwealth v. Quaker Oats Company*, supra (appeal dismissed 324 U. S. 827), we said at p. 260: ". . . the tax is imposed upon the privilege of doing business here, measured by capital stock. . . ."

In *Commonwealth v. Monessen Amusement Company, Inc.*, supra, the court below had held that the value of shares in a domestic corporation owned by a foreign corporation must be deducted in fixing the valuation of the foreign corporation for franchise tax purposes. In reversing the court below, this Court said at p. 122: ". . . Appellee's contention in the present case and the decision of the court below are both rested on the false assumption that the franchise tax, in some way, is a tax upon the *property* of the corporation which is used as a measure for the tax. . . .

"As we stated in Commonwealth v. Ford Motor Company, supra, the franchise tax is not a tax upon the property of the corporation, but upon the doing of business in this Commonwealth. . . ." (Emphasis the Court's).

In *Commonwealth v. American Gas Company*, 352 Pa. 113, 117 (1945), 42 A. 2d 161, we said: ". . . The former capital stock tax upon foreign corporations was a *property* tax which could only be imposed upon corporations having property subject to the jurisdiction of the taxing authori-

ties. The franchise tax, however, is a tax on the privilege of doing business and is an *excise* tax, as we have pointed out in numerous cases. . . ." (Emphasis the Court's).

In *Commonwealth v. Eaglis Corporation*, 354 Pa. 493 (1946), 47 A. 2d 661, we stated, p. 499, that the inclusion of intangibles as well as tangibles in the valuation of capital stock ". . . does not make the franchise tax a property tax. It is an excise upon a foreign corporation's privilege of doing business within the State: . . . The capital stock value is but a factor in the legislatively prescribed formula for determining the value of the privilege."

In referring to the *Columbia Gas and Electric Corporation, Ford Motor Company, Quaker Oats Company* and *Monessen Amusement Company* cases, appellant expressly concedes that these cases held that the franchise tax is an excise tax upon foreign corporations for the privilege of doing business in Pennsylvania. In its brief it states: "In these cases, the question, inter alia, of whether or not the franchise tax was an excise or a property tax was at issue and in each case the Court held that the franchise tax was an excise tax and that property such as United States securities and other intangible, as well as tangible, property located outside of the State could be constitutionally included in the tax base for the reason that there was no direct tax thereon."

In an effort to overcome the decisive effect of our rulings in the above cited cases, appellant points to language employed in some later cases which referred to the franchise tax as a property tax. These cases, *Federal Drug Company v. Pittsburgh et al.*, 358 Pa. 454 (1948), 57 A. 2d 849; *Murray et ux. v. Philadelphia et al.*, 364 Pa. 157 (1950), 71 A. 2d 280, and *National Biscuit Co. v. Philadelphia*, 374 Pa. 604 (1953), 98 A. 2d 182, were concerned with the validity of certain city ordinances. They arose under enabling statutes which permitted local municipal subdivisions to enter the tax field not occupied by the State, and the issue was whether the imposition of the local tax exceeded the power

granted the municipality by duplicating an existing tax levied by the State. The question presented in all of them was whether the local tax resulted in double taxation which was legislatively prohibited under the enabling Act. The local ordinance was under attack and not the State Franchise Tax Act. In *every* case arising between the Commonwealth and its taxpayers where the imposition of the franchise tax has been challenged, in upholding its validity we have invariably declared it to be an excise tax upon the privilege of doing business in the Commonwealth. We do not intend to depart from this settled ruling which is in complete accord with rulings of the United States Supreme Court, a number of which are hereinafter referred to.

After considering five of the cases which we have above reviewed unequivocally holding the tax in question to be an excise tax, and the three cases relied on by appellant as holding the contrary, President Judge RICHARDS, specially presiding, speaking for the unanimous court below, pertinently said: "The latter three cases mentioned above did not expressly overrule the first five referred to. The latter three were not contests between the State and its taxpayers. Interpretation and application of the franchise tax act were not directly involved. We know of no case in which the Supreme Court has deviated from its declaration that the franchise tax is a tax on foreign corporations for the privilege of doing business in Pennsylvania. . . . No matter what terminology has been employed as to the nature of the tax, or what adjectives have been used to describe it, the reported cases between the Commonwealth and its taxpayers, in which the statute is applied, have consistently held as we have indicated. It is our conclusion, therefore, that the tax settlement in the present case was correct."

In determining whether a tax duplicates another tax and results in double taxation prohibited to local taxing authorities, the operation or incidence of the two taxes is controlling as against mere differences in terminology from time to time employed in describing taxes in various cases.

The incidence of a tax embraces the subject matter thereof and, more important, the measure of the tax, i.e., the base or yardstick by which the tax is applied. If these elements inherent in every tax are kept in mind, the incidence of the two taxes may or may not be duplicative. Thus analyzed and viewed in determining whether double taxation has occurred, the *decisions* upon which appellant relies are readily reconcilable with the cases holding the corporate franchise tax to be an excise tax. The subject matter of the latter is the privilege of doing business in Pennsylvania and the measure is the value of the capital stock related to the exercise of the State franchise conferred on it. In *Federal Drug Company v. Pittsburgh*, 358 Pa. 454, supra, relied on by appellant, not only the measure but the subject matter of the mercantile license tax imposed by the challenged Pittsburgh ordinances differed from the State franchise tax. The distinctions were plainly set forth in the opinion of the Court. In disposing of the contention that the city tax duplicated the State franchise Act in violation of the prohibition of the so-called Tax Anything Act,[1] we said at p. 457:

"The answer to this contention is twofold. The Act of 1935, supra, is a tax for the privilege of a foreign corporation coming into the state of Pennsylvania for the purpose of conducting its business *in corporate form*. The city ordinance, under attack, is a tax for the privilege of doing business within the city with respect to *any* individual, partnership or corporation. It is not a tax limited to foreign corporate associations. In the second place, while in each case the *object* of the tax is to license for the purpose of doing business, the tax actually *imposed* by the

1. Act of June 25, 1947, P. L. 1145, as amended, 53 PS § 6851, which broadened the taxing powers of various political subdivisions (other than cities of the first class) and school districts, with the limitation, however, that they should not have authority to impose a tax on a privilege, transaction, subject, occupation, or personal property which is or becomes subject to a State tax or license fee, nor on the privilege of employing such tangible property as is or becomes subject to a State tax or license fee.

Foreign Corporate Franchise Tax is measured by the value of *the property of the foreign corporation within the state.* In the Pittsburgh ordinances the tax is on the *gross volume* of business conducted by the taxpayer. The respective impacts of the two taxes are on a totally different basis." (Emphasis the Court's).

In *National Biscuit Co. v. Philadelphia,* 374 Pa. 604, supra, relied upon by appellant, the City of Philadelphia had similarly imposed a mercantile license tax on the "gross volume of business" transacted by persons engaged in manufacturing, professions, occupations, trades, vocations and commercial activities in the City. As in the *Federal Drug Company* case, the Philadelphia mercantile tax differed widely both as to subject matter and measure from the State franchise tax, and accordingly was not duplicative of the latter. The reasoning and principles established in upholding the Pittsburgh mercantile tax in the *Federal Drug Company* case were equally applicable and decisive of the validity of the Philadelphia mercantile tax. It was therefore unnecessary in the *National Biscuit Co.* case to refer to the State franchise tax as a property tax or to treat it as such. In so doing language in the opinion in *Murray v. Philadelphia,* supra, was referred to, but what was said in the *Murray* case in this regard was likewise unnecessary to the decision there reached.

In the *Murray* case, decided in 1950, the Philadelphia ordinance imposing a net income tax was attacked. It was held invalid as violative of the Sterling Act.[2] The Philadelphia tax was measured by *net income* and the State corporate net income tax is measured by *net income.* There was a clear duplication in the impact of the two taxes, resulting in the prohibited double taxation. This compelled

2. Act of August 5, 1932, P. L. 45, 53 PS § 1597.1 which had previously broadened the tax powers of the City of Philadelphia in a manner similar to the Tax Anything Act of 1947 (see Footnote 1, supra), with like limitations, prohibiting the imposition of ". . . any tax on a privilege, transaction, subject or occupation or on personal property which is now or may hereafter become subject to a State tax or license fee."

the Court to hold as it did that the Philadelphia tax conflicted with the corporate net income tax and this was all that was required for the disposition of the case. However, the opinion, quite unnecessarily, went on to say that the Philadelphia tax also collided with the State franchise tax because both could be considered property taxes. This assertion rested upon a likening of the franchise tax to the capital stock tax. It was stated at p. 170: ". . . The franchise tax is imposed by the same Act of Assembly that imposes the capital stock tax and was obviously devised to reach the property of foreign corporations as the equivalent of the capital stock tax: Arrott's Estate, 322 Pa. 367, 371, 185 A. 697 (1936); Commonwealth v. Union Trust Co. of Pittsburgh, 345 Pa. 298, 307, 27 A. 2d 15 (1942) . . ." As stated in the opinion, the franchise tax has been considered ". . . an excise tax in some contexts, in others . . . a tax on property." In the *Murray* case the Court was considering the concept of the tax in passing on the validity of the City tax. In the instant case the concept of the tax is being considered in a direct attack upon the State franchise tax, and as before stated in this opinion, we have repeatedly and invariably ruled in cases between the Commonwealth and its taxpayers that the franchise tax is an excise tax and not a property tax. Moreover the Commonwealth was not a party to the *Murray* case and it should not be construed as adjudicating the rights of the Commonwealth.

Arrott's Estate and the *Union Trust Company* case were cited in support of the above quoted statement in *Murray*. No reference was made to later cases where the franchise tax was directly attacked and it was ruled that the franchise tax is *not* the equivalent of the capital stock tax. *Arrott's Estate*, decided in 1936, had ruled that, for the purpose of the exemption from personal property taxation of shares of stock on which capital stock tax had been paid, the franchise tax was the equivalent of the capital stock tax. The *Union Trust Company* case, decided in

1942, merely extended the rule in *Arrott's Estate* by extending the exemption for personal property taxation to shares of stock on which a tax on bank shares had been paid. In *Commonwealth v. Monessen Amusement Company, Inc.*, 352 Pa. 120, supra, decided in 1945, nine years after the decision in *Arrott's Estate*, and where we were directly construing the rights of a State taxpayer under the Franchise Tax Act, we denied to a foreign corporation an exemption for the ownership of stock of a domestic corporation claimed on the basis of double taxation, holding that there could be no double taxation, because the capital stock tax was a property tax, while the franchise tax was an excise tax for the privilege of doing business in Pennsylvania. We rejected the taxpayer's reliance upon the decision in *Arrott's Estate* and refused to find that the capital stock tax and the franchise tax were equivalent.

Conversely, in *Commonwealth v. Shenango Furnace Company*, 362 Pa. 491, 493, 67 A. 2d 113, decided in 1949, we denied to a domestic corporation an exemption from capital stock tax for the ownership of stock of a foreign corporation which was subject to the payment of franchise tax, saying: "As in the Monessen case, supra, the appellant bottoms its argument on the decision in Arrott's Estate, 322 Pa. 367, 185 A. 697, where a certain equivalence between the capital stock tax on domestic corporations and the franchise tax on foreign corporations was recognized. What the appellant overlooks, however, is that the equivalence, so noted, was of importance in Arrott's Estate to the construction of the express exemption provisions of the four mill county tax Act of June 17, 1913, P. L. 507, and the State Personal Property Tax Act of June 22, 1935, P. L. 414, there involved. No such question arises here under either of the statutes with which this case is concerned, viz., the capital stock tax Act of June 1, 1889, P. L. 420, and the franchise tax Act of May 16, 1935, P. L. 184. The questions of express exemption and of alleged double taxation

are without presently material bearing upon one another, as the Monessen case distinguishment of Arrott's Estate clearly reveals."

The *Monessen* and *Shenango* cases clearly demonstrate the line of cleavage between the decisions of this Court dealing directly with State corporation taxes, and those involving local taxes, and nullify the effect of the statement in *Murray* regarding the equivalence of the franchise tax and the capital stock tax, or at least limit the scope of the language there employed to cases where a conflict between a challenged local tax and a State tax was in question.

It should be readily apparent that the considerations before a court when confronted by an attack upon a local tax as violative of the Sterling Act or of the so-called "Tax Anything Act", and the considerations when an attack is made as here, upon the constitutionality and validity of a State tax, are wholly different. And equally apparent it must be that the words as used in either case have judicial meaning only within the context of the problem to which they are applied. When carefully analyzed, and the incidence of the taxes considered, the decisions in the cases relied on by appellant are not only consistent inter se, but are not at variance with the cases in which we have ruled the franchise tax to be an excise tax and not a property tax.

Appellant makes the additional contention that, whatever our ruling may be on the main issue presented, at least the United States securities owned by appellant should not be included in the tax computation because of the general immunity which such securities enjoy from State and local taxation.[3] This contention is not new; it was raised and rejected in the *Ford* and *Quaker Oats* cases, supra. In the *Ford* case, 350 Pa. 236, supra, Mr. Justice Allen Stearne in dismissing the contention that there was dis-

3. According to appellant's calculation, the elimination of its United States securities in the computation of the tax would reduce the tax payable by it to $50,080.27, entitling appellant to a credit of $8,241.33.

crimination in our tax laws against foreign corporations in favor of domestic corporations because of certain exemptions enjoyed by the latter in the computation of the capital stock tax, said at p. 250: ". . . In this contention there is apparent again appellant's studied confusion of the essential difference between a property tax and a franchise tax. Certain property of domestic corporations, *including United States obligations* and tangible property having an extraterritorial location is excluded from the valuation of their capital stock for purposes of the direct tax. Obviously, this property could not constitutionally be included. Similar property, if owned by a foreign corporation and so employed by it as to affect the value of the franchise in Pennsylvania, is, on the other hand, included in the measurement of the base of the franchise tax. . . ." (Emphasis supplied).

The United States Supreme Court has consistently ruled that a State may constitutionally levy an excise tax on corporations for the privilege of doing business, and measure the tax by the property or net income of the corporation, including tax exempt United States securities or the income derived therefrom: *Provident Institution v. Massachusetts,* 6 U. S. (6 Wall.) 611 (1868); *Society for Savings v. Coite,* 6 U. S. (6 Wall.) 594 (1868); *Hamilton Company v. Massachusetts,* 6 U. S. (6 Wall.) 632 (1868); *Home Insurance Company v. New York State,* 134 U. S. 594 (1890); *Tradesmens National Bank of Oklahoma City v. Oklahoma Tax Commission,* 309 U. S. 560 (1940); *Educational Films Corporation of America v. Ward, Attorney General of New York et al.,* 282 U. S. 379 (1931); *Werner Machine Co., Inc. v. Director of Division of Taxation, Department of the Treasury, of New Jersey,* 350 U. S. 492 (1956).

Appellant contends that the United States Supreme Court held otherwise in *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals of New Jersey et al.,* 338

U. S. 665. This is clearly a misinterpretation of the ruling. In that case a local tax assessment was held to be invalid because it was tax *on* United States securities. The United States Supreme Court distinguished the case from its decisions in *Tradesmens National Bank of Oklahoma City v. Oklahoma Tax Commission,* supra, and *Educational Films Corporation of America v. Ward,* supra, saying that the tax concerned in the latter two cases ". . . was not measured in effect by the amount of the taxpayer's federal securities or interest but *was a franchise tax measured by net income.* The section here in question was not considered as imposing a tax on privilege or franchise by either the New Jersey Legislature or the taxing officials or by any of the courts below. While we are not limited by the state's characterization of its tax, cf. Wisconsin v. J. C. Penney Co., 311 U. S. 435, 443 (1940), we likewise do not think the assessment can be sustained as one levied on a corporate franchise. . . ." (Emphasis supplied).

In the *Werner Machine Co.* case, 350 U. S. 492, supra, the Supreme Court held that the tax imposed by the State of New Jersey measured by the corporation's "net worth" was a tax on the corporate franchise which did not discriminate against Federal obligations and was valid despite the inclusion of Federal bonds in the determination of net worth. The appellant in that case made the same argument as appellant is making in the case before us. In sustaining the New Jersey tax the Court said at p. 494: ". . . And since this is a tax on the corporate franchise, it is valid despite the inclusion of federal bonds in the determination of net worth. This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property. [Citing cases]. . . . New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U. S. 665, on which appellant relies, is distinguishable, in that it did not involve a franchise tax, but rather a tax whose legal

incidence this Court found to be upon the intangible assets of the corporation."

Equally untenable is appellant's argument that in some way it has been deprived of due process. In *Standard Oil Company of Indiana v. State of Missouri on the Information of Hadley, Attorney General, Succeeded by Major*, 224 U. S. 270, 287, the Court said: "The 14th Amendment guarantees that the defendant shall be given that character of notice and opportunity to be heard which is essential to due process of law. When that has been done, the requirements of the Constitution are met, and it is not for this court to determine whether there has been an erroneous construction of statute or common law. . . ." The Commonwealth's Constitution requires no more.

Appellant claims that if the franchise tax settlement against it is upheld, such decision will be so contrary to the decision in *National Biscuit Co. v. Philadelphia*, supra, involving the same taxpayer, that it will amount to arbitrary judicial action and thus constitute a denial of due process. It is sufficient answer that, as we have pointed out, the decision in *National Biscuit Co. v. Philadelphia* is not inconsistent but, on the principles stated in the *Federal Drug Company* case, entirely reconcilable with our rulings in cases challenging the franchise tax. Even if appellant's untenable assumption were adopted that the two decisions are irreconcilable and that *National Biscuit Co. v. Philadelphia* must be considered a holding that the franchise tax is a property tax, that would not prevent this Court from presently ruling otherwise. As stated in *Patterson v. Colorado ex rel. The Attorney General of the State of Colorado*, 205 U. S. 454, 461: ". . . There is no constitutional right to have all general propositions of law once adopted remain unchanged. . . . in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, *is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed.*" (Emphasis supplied).

As first stated, however, we consider all of our decisions in cases involving statutory prohibition of double taxation entirely reconcilable with our many decisions declaring the franchise tax constitutionally unassailable. And we are satisfied that it was properly applied by the taxing authorities in the present case. The franchise tax has been so applied since its inception more than twenty years ago as an excise tax for the privilege of doing business in Pennsylvania in accord with our many decisions upholding the formula under which the tax due is ascertained and no sufficient reason has been advanced for changing our firm rulings.

Judgment affirmed.

CONCURRING OPINION BY MR. JUSTICE BELL:

I write this opinion with great reluctance, but fairness to the appellant compels me to do so. I am in complete disagreement with some parts of the majority opinion, its attempted distinctions of prior decisions of this Court, and its failure to overrule the latest decision of this Court, viz., *National Biscuit Company v. Philadelphia,* 374 Pa. 604, 98 A. 2d 182 (1953). In that case, where the basic issue was, as in the present case, whether the (State) Foreign Corporation Franchise Tax Act of May 16, 1935, P. L. 184, 72 PS 1871, imposed a franchise tax or a property tax, this Court held that said Act imposed a *property tax;* and therefore the so-called Philadelphia Mercantile License Tax, since it was an excise or franchise tax, was not a duplication of the State Foreign Corporation Franchise Tax Act and for this reason, it was not legislatively prohibited under the Sterling Act. The Court * relying upon the most recent decisions of this Court, viz., *Federal Drug Company v. Pittsburgh et al.,* 358 Pa. 454, 57 A. 2d 849 (1948), and *Murray v. Philadelphia et al.,* 364 Pa. 157, 71 A. 2d 280 (1950), held, we repeat, that the aforesaid Foreign Corpora-

* With Justices ALLEN M. STEARNE, BELL and MUSMANNO dissenting.

tion Franchise Tax Act of May 16, 1935, *imposed a property tax and not a franchise tax*, and said (page 612):

". . . as to the payments made to the Commonwealth of capital stock taxes, corporate net income taxes, *foreign corporation franchise taxes,* * * and taxes on net earnings or income, it need merely be pointed out that *all those taxes have been held, many times, to be property taxes.* In an opinion by Mr. Justice LINN, who cited many previous authorities so holding, the capital stock tax was again declared in Murray v. Philadelphia, 364 Pa. 157, 166, 71 A. 2d 280, 284, to be a tax on the property of the corporation, and so likewise (following Blauner's Inc. v. Philadelphia, 330 Pa. 342, 198 A. 889, and Philadelphia v. Samuels, 338 Pa. 321, 12 A. 2d 79) the corporate net income tax (p. 169, A. p. 286), *the franchise tax* (p. 170 A. p. 286), and (following Kelley v. Kalodner, 320 Pa. 180, 187, 181 A. 598, 601) a tax on net earnings or income (p. 175, A. p. 289). On the other hand, the authorities are equally numerous to the effect that a mercantile license tax is not a tax on property or income, but an excise [or franchise] ** tax upon the privilege of transacting business measured by the gross volume of business annually transacted: Knisely v. Cotterel, 196 Pa. 614, 46 A. 861; Commonwealth v. Harrisburg Light & Power Co., 284 Pa. 175, 130 A. 412; Commonwealth v. Globe Furnishing Co., 324 Pa. 180, 188 A. 170; Commonwealth v. McKinley-Gregg Automobile Co., 345 Pa. 544, 28 A. 2d 919; Commonwealth v. Bailey, Banks & Biddle Co., 20 Pa. Superior Ct. 210; H. J. Heinz Co. v. School District of Pittsburgh, 170 Pa. Superior Ct. 441, 87 A. 2d 85. *Since clearly, therefore, a mercantile license tax is not a duplication of any of the property taxes* paid by appellees to the Commonwealth, the City of Philadelphia is not prohibited by reason of any limitation on its power contained in the Sterling Act from imposing such a tax on corporations otherwise subject thereto."

** Italics and brackets throughout, ours.

The present majority opinion says: "Appellant contends that the tax as computed and imposed on it offends various provisions of the State and Federal Constitutions. The contention rests upon the premise or assumption that the Franchise Tax Act of 1935 imposed a property tax. In cases decided by this Court following the passage of the Act of 1935 we *unequivocally and repeatedly held that the franchise tax imposed by it is not a property tax* but, as its name implies, a tax levied for the privilege of doing business in the Commonwealth, and its constitutionality was upheld: Commonwealth v. Columbia Gas and Electric Corporation, supra (1939); Commonwealth v. Ford Motor Company, supra (1944); Commonwealth v. Quaker Oats Company, 350 Pa. 253 (1944), 38 A. 2d 325; Commonwealth v. Monessen Amusement Company, Inc., 352 Pa. 120 (1945), 42 A. 2d 158." This statement flies in the teeth of the more recent opinions and decisions of this Court which as above demonstrated held expressly, squarely and specifically to the contrary.

The present majority opinion attempts to distinguish the earlier cases from the recent cases which hold clearly, directly and exactly to the contrary, on the ground that the recent cases dealt with a local ordinance. Of course this attempted distinction not only disregards the recent decisions and the clear and forceful language of the Court's opinions, but it also completely overlooks the fact that the local ordinance (of the City of Philadelphia) whose validity was challenged was absolutely invalid and void under the Sterling Act, if it levied or collected "any tax on a *privilege*, transaction, *subject*, or occupation or on personal property which is now or may hereafter become subject to [1] a state tax or [2] a license fee." The most important and basic issue in *National Biscuit Company v. Philadelphia*, 374 Pa., supra, as well as in the recent cases hereinabove cited, was whether the State taxes—including the State Franchise Tax Act of May 16, 1935—were franchise taxes or property taxes. In that case the majority, we repeat, held that the

taxes imposed by the State Franchise Tax Act of 1935 (and other State Tax Acts enumerated therein) were *property taxes* and consequently sustained the validity of the Philadelphia so-called Mercantile License Tax as a franchise or excise tax, i.e., a tax for the privilege of doing business in Philadelphia. This was the basic and only legal ground upon which (a majority of) the Court sustained the ordinance.

How this Court can one moment say that a tax imposed by a certain State Act is a property tax, and the next moment say that it is a franchise tax, or vice versa, is to me incomprehensible;* how this Court can then say that all the flatly contradictory and irreconcilable decisions of this Court on this point are harmonious and reconcilable, is to me incomprehensible; and finally, how this Court can reach its present conclusion (that the State franchise tax is a franchise tax, with which I agree) without overruling *National Biscuit Company v. Philadelphia*, 374 Pa. supra, and the recent cases which say exactly the opposite, is likewise incomprehensible.

I would hold that the franchise tax which is imposed by the State by the Act of May 16, 1935, supra, on foreign corporations doing business in Pennsylvania, is a franchise tax; and I would overrule all prior decisions of this Court which hold that it imposes a property tax; and I would particularly overrule *National Biscuit Company v. Philadelphia*, 374 Pa., supra.

Mr. Justice MUSMANNO and Mr. Justice BENJAMIN R. JONES join in this concurring opinion.

---

* See footnote to my dissenting opinion in *National Biscuit Company v. Philadelphia*, 374 Pa., supra (p. 637): "The distinction or line of demarcation between a privilege tax, an excise tax and a property tax, which in the last analysis must be determined by the incidents and the nature and legal effect of the Act rather than by the name by which it is described, is so nebulous, flexible and fluctuating, that the decisions on this point throughout the entire country are ofttimes vacillating, confused and contradictory. See: 53 C. J. S., Licenses, pp. 457-461."

APPENDIX C.

PETITION FOR REARGUMENT AND ORDERS ENTERED IN SUPREME COURT OF PENNSYLVANIA NO. 25, MAY TERM 1957.

Order Entered Granting Extension of Time to File Petition for Reargument.

And Now, upon motion of Leslie M. Swope, Esq., of counsel for the Appellant, National Biscuit Company, upon cause shown as set forth in the accompanying petition, it is hereby ordered:

1. That Petitioner, National Biscuit Company, be and is hereby granted an extension of time within which to file a petition for reargument of the above entitled case until and including, Monday, December 2, 1957 and

2. That the Prothonotary of this Court shall hold the Record for said period of time and, upon filing such petition for reargument, until action is taken by the Court thereon.

Dated this 19th day of November, 1957.

Charles Alvin Jones,
C. J.

Petition of Appellant for Reargument (Filed Dec. 2, 1957).

To the Honorable, the Justices of the Supreme Court of Pennsylvania:

The petition of National Biscuit Company, appellant in the above case, by its attorneys, Roy J. Keefer and Leslie M. Swope, respectfully prays your Honorable Court to grant it a reargument for the reasons set forth below. The judgment of the lower court was affirmed on Novem-

ber 11, 1957 in two separate opinions and Appellant was granted an extension of time to and including December 2, 1957, within which to file this Petition.

I. By reaffirming the Court's prior decisions in National Biscuit Co. v. Philadelphia and other cases relied upon by Appellant, the majority in effect holds that the so-called franchise tax is still a property tax for some purposes and in some contexts. This is enough to make the tax settlement invalid as applied to Federal securities owned by Appellant.

The minority (Justices Bell, Musmanno and B. Jones) agreed that the State Franchise Tax is a franchise tax for the privilege of doing business in Pennsylvania but they would overrule the prior decisions of this Court holding that it is a property tax, and particularly, *National Biscuit Co. v. Philadelphia*, 374 Pa. 604 (1953)—where the Court held that the Franchise Tax is a property tax in determining whether the tax imposed under a local ordinance duplicated the State Franchise and Corporate Net Income Taxes. The concurring minority agree logically and inexorably that the State Franchise Tax cannot be both a franchise tax and a property tax in the same or different contexts, and; therefore, they conclude that the above cases should be overruled and not be allowed to remain in effect concurrently with the inconsistent decision in this case.

Although the majority now holds that the State Franchise Tax is a franchise tax for the privilege of doing business, they do not overrule or hold to be erroneous other decisions of this Court holding the State Franchise Tax to be a property tax or the "equivalent" of a property tax. As we shall develop hereinafter, it is these inconsistent decisions—on the one hand, the present majority decision and prior decisions holding the franchise tax to be a privilege tax, and on the other hand, the decisions of

this Court in *National Biscuit Co. v. Philadelphia*, 374 Pa. 604 (1953), *Com. v. Union Trust Company of Pittsburgh*, 345 Pa. 298 (1942), and *Arrott's Estate*, 322 Pa. 367 (1936) holding the Franchise Tax to be a property tax or the "equivalent" of a property tax—which violate the immunity of Appellant's investments in United States securities from State taxation. Appellant's contention on this point has been misapprehended and has not been clearly disposed of by the majority Opinion.

This can be demonstrated as follows:

Adverting to *Federal Drug Company v. Pittsburgh*, 358 Pa. 454 (1948) where the City of Pittsburgh mercantile license tax was held not to duplicate the State Franchise Tax on the ground that the "respective impact of the two taxes was on a totally different basis", the City tax being measured by gross volume of business and the State tax being measured by the value of the property of the foreign corporation within the state, the majority in the present Opinion say that the same difference existed between the City of Philadelphia mercantile license tax and the State Franchise Tax in *National Biscuit Co. v. Philadelphia*, 374 Pa. 604 (1953) and that, therefore, it was unnecessary in that case "to refer to the State Franchise Tax as a property tax or to treat it as such". As pointed out in the minority Opinion in the present case (p. 4), this flies in the teeth of the actual basis of the decision in *National Biscuit Co. v. Philadelphia*, supra, which was that the City tax, a tax for the privilege of doing business in Philadelphia was valid because it did not duplicate State property taxes—franchise, capital stock and corporate net income. In that case, the majority Opinion, after stating that the capital stock tax, the foreign franchise tax and the corporate net income tax "have been held many times to be property taxes" (p. 612) went on to say (p. 614):

> "We hold, therefore, that corporations otherwise subject to the city mercantile license tax are *not ex-*

empt therefrom by reason of the provisions of the Sterling Act *merely because they pay property taxes to the Commonwealth.*" (Emphasis supplied.)

See, also, Appellant's Brief, pp. 19-23. The ruling by (a majority of) the Court in that case that the State Franchise Tax is a property tax was not obiter dictum but was the basis of the decision. Furthermore, even though it were possible to have decided that case on a different basis, it was not so decided. The majority opinion in the present case does not overrule the decision in that case which is, therefore, still inconsistent with the majority Opinion in the present case.

In the *Murray* case, 364 Pa. 604 (1950) the Court in an unanimous opinion applied the "realities" test rather than the "nomenclature" test to determine whether the tax imposed by the Philadelphia ordinance on the net income of corporations and on corporate dividends duplicated state taxes. The Philadelphia tax, which was determined to be a property tax, was held to be invalid because it duplicated the State Capital Stock, Corporate Net Income and Franchise Taxes which were found to be property taxes. In support of its findings that the State Franchise Tax is a property tax, the Court cited and relied upon the cases of *Arrott's Estate,* supra, and *The Union Trust Company,* supra. In those two cases it was found by the Court that the franchise tax is the equivalent of and embraces the same elements as the capital stock tax.

The Personal Property Statute involved in *Arrott's Estate* supra, excepted from tax "shares of stock in any • • • corporation • • • liable to • • • tax on its shares or its capital stock for State purposes • • •, and it was held that since the franchise tax was the equivalent of, or embraced the same elements as, the capital stock tax, it was necessary to exempt from the tax, shares of foreign corporations in order to avoid double taxation.

The Statute imposing tax on the shares of trust companies involved in the *Union Trust Company* case, supra, excluded from the determination of the taxable value of the shares so much of the capital stock, surplus and undivided profits "as is not invested in * * * capital stock of corporations liable to pay to the Commonwealth a capital stock tax". The rule of the *Arrott's* case was extended in the *Union Trust Company* case to exclude from the taxable value, shares of foreign corporations subject to the franchise tax in order to avoid double taxation.

When the majority in the present case come to the *Murray* case, where the Court held that the franchise tax was a property tax, and seek to reconcile that opinion with the present holding that the State Franchise Tax is a privilege tax, they say that the Opinion in the *Murray* case "* * * quite unnecessarily, went on to say that the Philadelphia tax also collided with the State Franchise Tax because both could be considered property taxes" and that "This assertion rested upon a likening of the franchise tax to the capital stock tax." (See the *Arrott* and *Union Trust Company* cases, supra.) The majority went on to quote with approval from the Opinion in the *Murray* case that the franchise tax has been considered "* * * an excise tax in some contexts, in others * * * a tax on property." They proceeded to point out that in the *Murray* case this Court was considering the concept of the franchise tax in Pennsylvania in passing on the validity of the City tax, whereas, in the present case the concept of the tax is being considered in a direct attack upon the State Franchise Tax. They concluded that the more recent cases of *Commonwealth v. Monessen Amusement Company, Inc.*, 352 Pa. 120 (1945) and *Commonwealth v. Shenango Furnace Company*, 362 Pa. 491, 493 (1949) where the State Franchise Tax was involved directly and was held *not* to be the equivalent of the Capital Stock Tax, "nullify the effect of the statement in *Murray* regarding the equivalence of the franchise tax and the

capital stock tax, or at least limit the scope of the language there employed to cases where a conflict between a challenged local tax and a State tax was in question."

Hence it will be seen that the majority in the present case approve the difference in the determination of the nature of the State Franchise Tax where that tax is referred to in different contexts. They do not hold to be erroneous their rulings in the *Murray, Arrott* and *Union Trust Company* cases that the State Franchise Tax is a property tax, and the decisions in those cases are inconsistent with the majority decision in the present case holding that the franchise tax is a privilege tax.

Appellant contended, based upon the inconsistent decisions of this Court as to the nature of the franchise tax and based upon the difference in determination as to the nature of the franchise tax depending upon the context in which that term was used, that this Court in the present case must exclude its investment in United States securities in the computation of its franchise tax liability. The Court misapprehended this contention and did not clearly discuss or decide it. Appellant's contention on this point may be summarized as follows:

A. *The inconsistent Opinions of the Court as to the nature of the franchise tax violate the immunity of Appellant's investment in United States securities from State taxation.*

If for purposes of determining the validity of local ordinances the franchise tax is a property tax as in the *Murray* case and in *National Biscuit Co. v. Philadelphia*, supra, and, if for purposes of personal property tax in *Arrott's Estate*, and, if for purposes of shares tax in the *Union Trust Company* case, the franchise tax must be regarded as the equivalent of the capital stock tax in order to avoid double taxation, this Court cannot take a lesser

view in respect to Appellant's investment in United States securities in the determination of its franchise tax liability. The State cannot play fast and loose with the delicate problem of taxing United States securities by describing a tax one way for some purposes and another way for different purposes, or reach different interpretations of the nature of the franchise tax depending on whether or not the Commonwealth is a party to the litigation. To do so would "diminish * * * the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." *Smith v. Davis*, 323 U. S. 111, 117 (1944). Nor can a State Court "throw tax liability where it chose, * * *", *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, 121 (1954).

That the United States Supreme Court has in no way relaxed its enforcement of the immunity of United States securities from State tax is evidenced by its recent decisions in *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals of New Jersey*, 338 U. S. 665, 675 (1949) and in *Society for Savings in the City of Cleveland v. Bowers*, 349 U. S. 143 (1955). In the *Realty Title Insurance* case, the State Courts were uncertain as to the nature of the State Tax. In the *Bowers* case, the State Court's interpretation of the taxing statute appears to be contrary to the provisions thereof. In both cases it was held that, on the basis of the practical effect and operation of the State tax, the tax was a property tax and not a privilege tax and, therefore, the tax violated the immunity of United States securities from State taxation.

The decisions of this Court holding that the State Franchise Tax is a property tax based on the "realities" test are analogous to the *New Jersey Realty Title Insurance* case and the *Bowers* case and, therefore, the franchise tax imposed on Appellant violates the immunity of United States securities from State taxation.

B. *Discrimination against Appellant's investment in United States securities results from the Court's decision.*

If for any reason the State Franchise Tax is a property tax (the cases of *Murray* and of *National Biscuit Co. v. Philadelphia*) or, if the franchise tax is the equivalent of the capital stock tax (*Arrott's Estate* and *Union Trust Company* cases), Appellant's investment in United States securities must be exempted in the computation of its franchise tax liability because a similar exemption is allowed to domestic corporations for the investment in United States securities for capital stock tax purposes (R. 48a, 49a).

If the franchise tax is the equivalent of the capital stock tax, illegal classification results where the same exemption allowed to domestic corporations for investments in United States securities for capital stock tax purposes is not accorded to Appellant for franchise tax purposes. See *Arrott's Estate,* supra, page 373.

The alleged discrimination results in violation of the uniformity of taxation provisions of Section 1 of Article IX of the Constitution of the Commonwealth of Pennsylvania and the equal protection of the laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The majority in the present case erroneously states on page 12 of its Opinion that Appellant's basic contention was raised in the cases of *Commonwealth v. Ford Motor Company,* 350 Pa. 236 (1944) and *Commonwealth v. Quaker Oats Company,* 350 Pa. 253 (1944). Those cases were decided prior to the *Murray* case and the case of *National Biscuit Co. v. Philadelphia,* where in applying the "realities" test, the Court found that the State Franchise Tax is a property tax.

It is conceded that, if the decisions of the Court were consistent in holding the State Franchise Tax to be a privilege tax, assets exempt from property taxation would not

need to be excluded from the computation of the franchise tax liability. But that is not the situation in the present case. Here the decisions of the Court are inconsistent, some holding the State Franchise Tax to be a privilege tax and others holding the State Franchise Tax to be a property tax. Under the property tax cases, the *incidence* of the tax is upon Appellant's assets and, therefore, the tax violates the immunity of Appellant's investment in United States securities from State taxation as was held in the *New Jersey Realty Title Insurance Company* case, supra.

The case of *Werner Machine Co., Inc. v. Director of Division of Taxation, Department of the Treasury of New Jersey*, 350 U. S. 492 (1956) is not applicable in the instant case because the New Jersey Statute involved in the *New Jersey Realty Title Insurance Company* case was changed and under the changed statute the New Jersey State Courts were consistent in construing the tax imposed by the Statute to be a franchise tax "for the privilege of having or exercising its corporate franchises in the State".

II. The fact that the majority felt impelled to sustain the Case of National Biscuit Co. v. Philadelphia shows that the Court was mistaken as to the single nature of the tax and the validity of including out of state assets comprised in part of United States securities.

The Court failed to give proper consideration to the fact that the foreign franchise tax provisions are a part of the capital stock tax structure. Section 21(b) of the Franchise Tax Statute substituted a franchise tax for the capital stock tax theretofore imposed on foreign corporations doing business in Pennsylvania. No mention is made of a privilege tax. The tax is imposed upon capital stock at a valuation. Furthermore, in a proviso to Section 21 it is provided that corporations subject to tax under this Sec-

tion "shall not be required to pay any *further* tax on the mortgages, bonds and other securities owned by them • • •" (Emphasis supplied). These provisions of Section 21 make it clear that tax on the capital stock and tax on the property would constitute double taxation and that, therefore, the tax is a property tax.

In *Murray v. Philadelphia*, 364 Pa. 157, the Court said at Page 170:

> "• • • The franchise tax is imposed by the same Act of Assembly that imposes the capital stock tax and was obviously devised to reach the property of foreign corporations as the equivalent of the capital stock tax: • • •".

This is a further indication that the franchise tax is a property tax.

These cases holding the franchise tax to be a property tax were not held to be erroneous and were not overruled in the majority Opinion in the present case.

If the State Franchise Tax is a property tax, then the tax may not be imposed upon Appellant's out of state assets, including its investment in United States securities.

III. The concurring opinion of the minority Justices clearly shows that the majority opinion is mistaken as to the issue decided in National Biscuit Co. v. Philadelphia, and is still refusing to adjudicate consistently the nature of the franchise tax; and, therefore, is guilty of an abuse of judicial power, in violation of due process.

The minority opinion states emphatically that the Court in *National Biscuit Co. v. Philadelphia* held the State Franchise Tax to be a property tax and that this was the basis for upholding the City tax in the *Philadelphia* case. Therefore, the decision in the present case is inconsistent with the Opinion in the *Philadelphia* case holding the State Franchise Tax to be a property tax.

It is true that due process does not require judicial interpretation to remain consistent but *it is still necessary for those retained in effect to be consistent.*

It is well settled that the prohibition of the Fourteenth Amendment to the Constitution of the United States applies to arbitrary action by the Judiciary. *Chicago, Burlington, and Quincy Railroad Company v. Chicago,* 166 U. S. 226, 233-234 (1897), *Ladner et al. v. Siegel,* 298 Pa. 487, (1930). Likewise, it is established that the test of due process is essentially a test of reasonableness. *Santiago v. People of Puerto Rico* (C. C. A. First Circuit), 104 F. 2d 811 (1936).

The right asserted by Appellant in the present case is reasonable adjudication of its tax liability and protection against arbitrary action. We are not concerned here with the power of Courts to reverse themselves, to indulge in error, and to correct and make changes by judicial construction. If in the present case this Court, in acting upon this petition for reargument sustains the franchise tax as a privilege tax, which would be directly opposed to its ruling in *Philadelphia* and prior cases that the franchise tax is a property tax, we would then be concerned here with simultaneous opposite views of the Court, each impeaching the logic of the other and each not overruling the other. Such a situation would not constitute reversal of prior decisions, mere error, or change by judicial construction but would instead, it is respectfully submitted, constitute an intentional ruling without justification, based more on expediency than on sound principles.

It is submitted that the minority in the present case were right in insisting that *National Biscuit Co. v. Philadelphia* and all prior decisions holding the franchise tax to be a property tax be overruled.

So long as this is not done, due process is denied to Appellant.

IV. For reasons assigned by the concurring minority and for reasons assigned in Part III of this Petition, it is respectfully submitted that the case should be reargued on the point as to overruling National Biscuit Co. v. Philadelphia.

In further support of the reasons assigned therein the following additional reason, supporting reargument in the present case, may be assigned:

The local ordinance of the City of Philadelphia, whose validity was challenged in that case, should be held invalid and void under the Sterling Act, if it levied or collected "Any tax on a *privilege,* transaction, *subject* or occupation or on personal property which is now or may hereafter become subject to a State tax or license fee". (R. 79A) (Emphasis supplied).

Since the decision of the Court in the present case holds the franchise tax to be a privilege tax, then the Philadelphia Ordinance is taxing a privilege or subject which is the same as that taxed under the Franchise Tax Statute.

For the reasons stated above, it is respectfully requested that a reargument be granted Appellant by the Court.

Attached hereto are copies of the two Opinions filed in the case.

Order Entered on Petition for Reargument.

Now, Jan. 2, 1958, Petition denied.

Per Curiam.

APPENDIX D.

RELEVANT PARTS OF OPINIONS AND JUDGMENT ENTERED IN RELATED CASE OF NATIONAL BISCUIT CO. v. PHILADELPHIA, (Appeal No. 214), 374 Pa. 604, 98 A. 2d 182.

Argued June 1, 1953. Before STERN, C. J., STEARNE, JONES, BELL, CHIDSEY, MUSMANNO and ARNOLD, JJ.

Appeals, Nos. 196, 214, 215, 216 and 219, from decrees of Court of Common Pleas No. 2 of Philadelphia County, Dec. T., 1952, Nos. 2304, 6974, 7623 and 8371 and March T., 1953, No. 1434, in Equity, in cases of J. Alden Tifft, et al. v. City of Philadelphia, et al., National Biscuit Company v. Same, Household Finance Corporation et al. v. Same, and Gerald W. Caner, et al. v. Same. Appeal, No. 214, decree reversed, reargument refused July 9, 1953; Appeals, Nos. 215 and 216, decree affirmed; Appeal, No. 196, decree affirmed, reargument refused September 30, 1953; Appeal, No. 219, decree reversed.

Bill in equity to enjoin enforcement of mercantile license tax ordinance. Before LEWIS and CARROLL, JJ.

Adjudication filed holding ordinance invalid in its application to corporations. Defendants appealed (Appeals, Nos. 214, 215, 216).

* * *

OPINION BY MR. CHIEF JUSTICE HORACE STERN, June 26, 1953:

The present appeals challenge the validity of an ordinance of December 9, 1952, of the City of Philadelphia and question its applicability to the various taxpayers involved in these proceedings.

It has become a mere platitude to state, what has so often been proclaimed, that courts are concerned, not with the wisdom of legislation, but with the right of the legislative body to enact it,—not with *policy* but with *power*.

The ordinance is entitled in part: "An Ordinance to provide revenue by imposing a mercantile license tax on persons engaging in certain businesses, including manufacturing, professions, occupations, trades, vocations, and commercial activities in the City of Philadelphia." It levies an annual tax on wholesale and retail dealers or vendors, manufacturers and all other persons engaged in business, at the rate of 3 mills on each dollar of the annual gross volume of business transacted. "Gross volume of business" is defined to mean, with certain exceptions, gross receipts, including both cash and credit transactions. "Business" is defined to mean "the carrying on or exercising for gain or profit within the City of Philadelphia of any trade, business, profession, vocation, or making sales to persons within the City of Philadelphia, or of any manufacturing, commercial or financial activity, service or business, including but not limited to manufacturers, brokers, wholesale dealers, or wholesale vendors, retail dealers or retail vendors"; it does not include any employment for a wage or salary. Every person desiring to engage in, or to continue to engage in any business is required to procure a mercantile license for each of his places of business in the City, paying therefor a fee of $3 for each such place.

In the argument on these appeals an attack was made upon this legislation on the ground that the title of the ordinance is constitutionally defective and that the terms of the ordinance itself are vague and uncertain. Those criticisms, however, were apparently not seriously pressed, and, in any event, they do not merit serious discussion. Another complaint urged was that the ordinance does not limit itself to the scope of the usual mercantile license tax because, it is alleged, such taxes have "historically" been imposed only upon merchants, whereas this ordinance

purports to tax also persons otherwise engaged. But, whether that fact be true or not, it is certainly wholly irrelevant because the sole question is whether the City has the power to impose the tax upon such "additional" persons and not whether preceding acts or ordinances have included them.[1] Moreover, the ordinance itself provides that if the tax, or any portion thereof, which it imposes shall be held by any court of competent jurisdiction to be in violation of any constitutional or statutory provisions, as applied to any person, such decision shall not affect or impair the right to impose the tax, or the validity of the tax so imposed upon other persons as therein provided. Even if, therefore, it should be adjudged that the tax cannot validly be applied to any particular person or persons that would not affect or impair the validity of the ordinance as to those properly subject thereto. Accordingly, it is clear that the ordinance, as such, is a valid enactment, and that the only questions requiring consideration are those concerning its applicability to persons which it assumes to tax who are engaged in certain types of business, professions, occupations, and financial activities.

The Act of August 5, 1932, special session 1932, P. L. 45, being the so-called "Sterling Act," gave authority to the council of any city of the first or second class,[2] for general revenue purposes, to levy, assess and collect such taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of such city, as it should determine, except that such council should

1. Incidentally it is of interest to note that the Acts of May 23, 1949, P. L. 1669, and May 10, 1951, P. L. 265, imposing a similar tax for the purpose of providing revenue for school districts of the first class, are in fact almost as broad as the present ordinance and define "business" and "financial business" in nearly the same language. Also, in the Pittsburgh mercantile license tax which was the subject of discussion in *Federal Drug Co. v. Pittsburgh*, 358 Pa. 454, 57 A. 2d 849, liability was extended even to persons conducting or operating places of amusement, including theatres, motion picture houses, billiard and pool rooms, baseball and football fields, and a large number of other such places.

2. The Act provides that as to cities of the second class it should remain in force only until June 1, 1935.

not have authority to levy, assess and collect any tax on a privilege, transaction, subject or occupation, or on personal property, which then was or might thereafter become subject to a State tax or license fee. While, therefore, this statute vested in the council of the City of Philadelphia an enormously broad and sweeping power of taxation, that grant was attended by the important limitation that no tax could be thus imposed if it duplicated the State's own imposition of a tax or license fee.[3] Because of that limitation National Biscuit Company, one of the present appellees, claims exemption from the City tax because, as a corporation, it pays annually to the Commonwealth a corporate net income tax under the Act of May 16, 1935, P. L. 208, as reenacted and amended, and, as a foreign corporation, a franchise tax under the Act of June 1, 1889, P. L. 420, as amended, and also, to the School District of Philadelphia, an annual tax on gross receipts under the Act of May 23, 1949, P. L. 1669, as reenacted and amended.

* * *

The court below held that because of these various payments all of these appellees were relieved from payment of the City tax. We are not in accord with this conclusion.

In the first place, as far as the payments made to the School District of Philadelphia are concerned, it is sufficient to say that in *McClelland v. Pittsburgh*, 358 Pa. 448, 57 A. 2d 846, we held that a tax imposed for the benefit merely of a local political subdivision, and not for general State purposes, is not to be regarded as a State tax within the meaning of that term in the "Tax Anything" Act of June 25, 1947, P. L. 1145, which, as previously stated, contained a limitation on the authority of the municipal legislative body similar to that embodied in the Sterling Act. This ruling was followed in *Federal Drug Co. v. Pittsburgh*, 358 Pa. 454, 57 A. 2d 849.

3. Similar power was subsequently granted by the so-called "Tax Anything" Act of June 25, 1947, P. L. 1145, as amended, to the duly constituted authorities of certain other political subdivisions of the Commonwealth, but with somewhat greater limitations than those contained in the Sterling Act.

In the second place, as to the payments made to the Commonwealth of capital stock taxes, corporate net income taxes, foreign corporation franchise taxes, and taxes on net earnings or income, it need merely be pointed out that all those taxes have been held, many times, to be property taxes. In an opinion by Mr. Justice LINN, who cited many previous authorities so holding, the capital stock tax was again declared in *Murray v. Philadelphia,* 364 Pa. 157, 166, 71 A. 2d 280, 284, to be a tax on the property of the corporation, and so likewise (following *Blauner's Inc. v. Philadelphia,* 330 Pa. 342, 198 A. 889, and *Philadelphia v. Samuels,* 338 Pa. 321, 12 A. 2d 79) the corporate net income tax (p. 169, A. p. 286), the franchise tax (p. 170, A. p. 286), and (following *Kelley v. Kalodner,* 320 Pa. 180, 187, 181 A. 598, 601) a tax on net earnings or income (p. 175, A. p. 289). On the other hand, the authorities are equally numerous to the effect that a mercantile license tax is not a tax on property or income, but an excise tax upon the privilege of transacting business measured by the gross volume of business annually transacted: *Knisely v. Cotterel,* 196 Pa. 614, 46 A. 861; *Commonwealth v. Harrisburg Light & Power Co.,* 284 Pa. 175, 130 A. 412; *Commonwealth v. Globe Furnishing Co.,* 324 Pa. 180, 188 A. 170; *Commonwealth v. McKinley-Gregg Automobile Co.,* 345 Pa. 544, 28 A. 2d 919; *Commonwealth v. Bailey, Banks & Biddle Co.,* 20 Pa. Superior Ct. 210; *H. J. Heinz Co. v. School District of Pittsburgh,* 170 Pa. Superior Ct. 441, 87 A. 2d 85. Since clearly, therefore, a mercantile license tax is not a duplication of any of the property taxes paid by appellees to the Commonwealth, the City of Philadelphia is not prohibited by reason of any limitation on its power contained in the Sterling Act from imposing such a tax on corporations otherwise subject thereto. Indeed it was definitely so decided in *Federal Drug Co. v. Pittsburgh,* 358 Pa. 454, 57 A. 2d 849, where the mercantile license tax imposed by an ordinance of the City of Pittsburgh was upheld; it was there concisely and categorically

stated in an opinion by Mr. Justice ALLEN M. STEARNE, speaking for a unanimous court, that a mercantile license tax did not duplicate or conflict with either the corporate net income tax or the foreign corporation franchise tax. The court below was of the opinion that this holding in the *Federal Drug* case was overruled, or at least impaired, by the decision in the *Murray* case. Nothing could be further from the truth. The ordinance held invalid in the *Murray* case attempted to tax dividends received by persons on shares of stock in corporations paying these various property taxes, and it was held that, since such dividends represented merely a distribution of the net income of the corporation, a tax thereon was a *property* tax and therefore a duplication of the property taxes paid by the corporation to the Commonwealth. What was held in the *Federal Drug* case was that, the mercantile license tax *not* being a property tax, it was *not* a duplication of the property taxes paid by the corporation. An analysis of the two cases makes this distinction entirely clear and there is not the slightest basis for the contention that they are other than in complete accord.

We hold, therefore, that corporations otherwise subject to the city mercantile license tax are not exempt therefrom by reason of the provisions of the Sterling Act merely because they pay property taxes to the Commonwealth. But these appeals require careful consideration of claims to exemption from the tax imposed by the City ordinance based on another reason than that heretofore discussed, namely, the payment to the Commonwealth of alleged "license fees," the Sterling Act providing that the council of the city shall not have authority to levy a tax on a privilege, transaction, subject or occupation "which is now or may hereafter become subject to a State tax or *license fee*".

* * * *

(Discussion re license fee point omitted as irrelevant to present appeal.)

ORDER

In Appeal No. 214 January Term 1953, the decree of the court below is reversed at the cost of appellee.

* * *

OPINION BY MR. JUSTICE ALLEN M. STEARNE, CONCURRING IN PART AND DISSENTING IN PART:

I concur in the illuminating opinion of the Chief Justice as to the validity of the ordinance. The sole concern of this Court is the *power* of the City Council to make and enforce enactments. With the wisdom of the ordinance we are not judicially concerned.

I dissent, however, in Appeal No. 196 of J. Alden Tifft et al., Insurance Agents and Brokers.

* * *

(Discussion of Tifft and other appeals involving license fee question omitted as irrelevant to this appeal.)

OPINION BY MR. JUSTICE BELL CONCURRING IN PART AND DISSENTING IN PART:

The Sterling Act prohibits the City of Philadelphia from levying or collecting "any tax on a *privilege*, transaction, *subject* or occupation or on personal property which is now or may hereafter become subject to [1] a state tax *or* [2] a *license fee.*"*

---

* Italics throughout, ours.

The Chief Justice has ably expounded the law with respect to the meaning of the words "license fee" as used in the Sterling Act. I agree with his construction of this licensee fee prohibition and of the application thereof to the cases of *The Philadelphia Saving Fund Society, The Western Saving Fund Society, The Beneficial Saving Fund Society,* and *The Saving Fund Society of Germantown; Household Finance Corporation, Household Consumer Discount Company, Caner, et al., Tifft, et al.,* and *National Biscuit Company.* However, I disagree with the majority opinion so far as it deals with corporations which pay to the State of Pennsylvania a corporate net income tax.

As recently as 1950 this Court flatly and unanimously decided in *Murray v. Phila.,* 364 Pa. 157, 71 A. 2d 280, that the Sterling Act prohibited Philadelphia from levying a tax on the net profits or net income of (every person, including) a corporation, domiciled in Philadelphia because the State taxed (when we look beneath the form and surface to the substance, i.e., to the realities) the net income of a corporation. We there said: "In construing the Act, it is immaterial that state taxes have been referred to as excise or franchise taxes or by any other adjective; *the reality controls. The fact that this tax* [the corporate net income tax] *is paid to the state conclusively shows that the city has no jurisdiction to tax the corporate income.*"

In 1953 (when we look beneath the form and surface to the substance or realities) we find that the present Philadelphia Ordinance unquestionably and without the slightest doubt taxes the gross (or in the alternative, the net) income of a corporation; but because the ordinance calls the tax by a different name, *the same tax* that was declared invalid 3 years ago is now sustained by a majority of this Court. How unrealistic can we be?

But even if we close our eyes to reality and assume that this Philadelphia Ordinance does not, in reality and in its

operations and practical effect, impose an income tax on corporate income, but merely an "excise" tax for the privilege of doing business (measured by the corporate income) the City is still prohibited because, irrespective of what the City tax is called or is determined to be, *it is a replica of* and identical with the corporate net income tax and consequently taxes the *same "privilege"*, i.e., the privilege of doing business in Philadelphia, *and the same subject*, i.e. *corporate income*, as the State does. This fundamental fact was overlooked by the majority opinion which became enmeshed in attempting to distinguish "excise" taxes from "property" taxes, and fell into the basic error of adopting and applying one test for the Act, i.e., the "realities" test, and an entirely different test, i.e., the nomenclature test, for the Ordinance.

In order to determine whether the City is attempting to tax a "privilege" or a "subject" which has already been taxed by the State and is therefore prohibited, we must first examine the legislative intent as disclosed by the Sterling Act, the Corporate Net Income Tax Act, and by the City Ordinance.

The Corporate Net Income Tax Act by its very terms is "An Act to provide revenue . . . *by imposing an excise tax* . . . on the net *income* of certain corporations. . . ." What for? ". . . *for the privilege* of doing business in this Commonwealth." The City Ordinance by its very terms is "An Ordinance to provide revenue by imposing a mercantile license [excise] tax on persons . . . any individual, partnership, association or corporation engaging in certain businesses including manufacturing, professions, occupations, trades, vocations. . . ." What for? For the privilege of doing business in Philadelphia. What is the tax imposed? ". . . on the gross receipts [gross income] of persons, including certain corporations, engaging in certain businesses in the City of Philadelphia." If, so far as corporations are concerned, that isn't a duplication of both "privilege" and "subject", each of which is banned by the

Sterling Act, then the word "duplication" no longer has any meaning in our language.

The Ordinance, which it is frankly admitted is intended to produce $17,000,000. annually, further provides, in imposing a 3 mills tax on each dollar of the annual gross volume of business, that "'Gross Volume of Business' means *gross receipts* and shall include both cash and credit transactions . . . or . . . In the Alternative at the option of the [taxpayer] at the rate of two (2) per centum of the annual gross volume of business transacted by such person *less the cost of goods and less the cost of labor.* . . ." This unquestionably means in the case of a corporation, 3 mills on the corporate gross income or 2% of *the corporate net income.* When it is realized that this tax is imposed upon virtually every person, partnership, manufacturer, profession, trade and corporation engaged in business in Philadelphia, it is clear to every layman and, I believe, to every careful analyst, that the tax is in reality and actuality not a genuine mercantile license tax, but a *gross income tax* (or, in the alternative, a net income tax) *on* individuals and *corporations* engaged in business in Philadelphia. The words "mercantile license tax" are obviously a misnomer. If the City frankly, openly and undisguisedly imposed a tax on corporate gross or net income, but called it a mercantile license tax, could anyone justifiably contend that such a tax was not prohibited by the Sterling Act and by *Murray v. Phila.*, 364 Pa., supra? Yet that, in effect and in reality, is exactly what the City has done in and by its present ordinance.

Murray v. Phila. reiterated the law that "the *practical operation of the two taxes is controlling*"; and the city's power to tax must be strictly construed against the city. Nevertheless, the majority opinion, after holding that the corporate net income tax, in spite of calling itself an "excise" tax, is in reality a "property" tax, completely ignores the aforesaid legal principles and holds that the City tax which uses identical language with the Act is an "excise"

tax and is not a tax on the income of a corporation. I repeat: How unrealistic, how impractical can we be?

Let's examine a little more closely just what the Philadelphia Ordinance attempts to tax and what is the practical operation of this City tax upon corporate income. The Ordinance first "apes" the historical mercantile license tax by taxing dealers and vendors at the rate of 3 mills on their gross volume of business or *gross receipts*, which are defined to be one and the same. It then immediately shows its real nature and true colors by taxing every manufacturer, every corporation, and, with a few exceptions, every person engaged in business in Philadelphia 3 mills on the annual gross (receipts or) income, or in certain cases alternatively, 2% on their net income. This is not a real or true or genuine mercantile license tax on vendors, dealers or merchants for the privilege of selling goods, wares or merchandise or engaging in kindred businesses as are most, if not all, of the genuine mercantile taxes imposed by municipalities under the "Tax Anything Act". This is, we repeat, in reality and in its practical operations and effect, a thinly disguised gross (or, in the alternative, net) tax on income of (inter alia) corporations falsely and ingeniously masquerading as a mercantile license tax. Labeling poison as chocolate does not and will not make it chocolate. Nomenclature, labels and technical distinctions are of relatively little weight in determining what a tax really is; *realities control the determination: Murray v. Phila.*, 364 Pa., supra; *Arrott's Estate*, 322 Pa 367, 185 A. 697; *Armour & Co. v. Pittsburgh*, 363 Pa. 109, 69 A. 2d 405. This corporate income is exactly what the majority say is taxed by the State in the Corporate Net Income Tax and this is specifically what is specifically prohibited in and by the Sterling Act: *Murray v. Phila.*, 364 Pa., supra.

The majority opinion assumes that this City tax is a real mercantile license tax in spite of the fact that it taxes nearly every man, woman, child, profession, partnership and corporation doing business in Philadelphia, and asserts

that such a tax is technically *an excise tax*, and the corporate net income tax is technically *a property tax* and therefore there is no duplication. Whether we approach this question from a technical or a non-technical point of view is immaterial, for irrespective of whether the corporate net income tax is denominated or is held to be an excise tax or a property tax, if the Commonwealth imposes a tax on a corporation for the privilege of doing business, the City is prohibited from imposing a tax on a corporation for the privilege of doing business, or if the State imposes a tax on the same (property or) subject which the City attempts to tax, i.e., income of a corporation, the City's tax is clearly and specifically prohibited by the Sterling Act.

The only distinction between the Act and the Ordinance is that the City's measuring rod or tax is *gross* as distinguished from *net* income of corporations. This does not constitute a distinction in the privilege or subject or nature of the tax, but merely makes the tax more onerous and unjustifiable. A study of the Act and of the Ordinance demonstrates that they are twin brothers; and whatever the corporate net income tax is determined to be, *the City tax is exactly the same.*

When the legislature prohibited Philadelphia from taxing any *"privilege"* or any *"subject"* which was taxed by the State, in order to preserve the sources of the State's income, they were not talking Greek—they were not thinking of what was or was not an excise tax, or what was or was not a property tax which even this Court cannot consistently determine—they were talking plain, clear English which every member of the legislature and at least every layman could understand. When the Supreme Court vacillates from one case to another as to whether the corporate net income tax is an excise tax or a property tax, it would seem unreasonable to hold that the legislature was referring to these taxes when it used the words "privilege" or "subject."

The majority opinion says that the corporate net income tax* and capital stock taxes and taxes on net earnings have been held many times to be property taxes. This Court in the very recent case of *Murray v. Phila.*, 364 Pa. (1950), without overruling or even discussing the cases which held to the contrary, decided that the corporate net income tax is a "property" tax; and that the Philadelphia Ordinance which *imposed, openly and without subterfuge, income taxes* on various persons and corporations in Philadelphia was *invalid* because it was prohibited by the Sterling Act. This Court could reach such a conclusion only by looking below the surface into the "realities". Looking at the realities, this Court squarely decided, inter alia, that under the Sterling Act the City of *Philadelphia has no power (a) to tax the income of a domestic corporation* which pays a capital stock tax or a corporate net income tax to the state; or (b) to tax the income of a foreign corporation which pays a franchise tax to the state, because a franchise tax is the equivalent of a capital stock tax for domestic corporations; or (c) to tax the net income of a credit union; or (d) even to tax a dividend in the hands of a shareholder which was received from a corporation which pays corporate net income taxes to the state; or which was received from a foreign corporation which pays a franchise tax to the state, or which was received from a state bank or a national bank; and (e) has no power to tax income from bonds in the hands of a bondholder which was received

---

* So far as corporate net income tax is concerned, this Court more frequently held that it was an excise tax for the privilege of doing business in Pennsylvania. See: *Com. v. Curtis Publishing Co.*, 363 Pa. 299, 69 A. 2d 410; *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa. 421, 184 A. 37; *Com. v. Warner Bros.*, 345 Pa. 270, 27 A. 2d 62; *Com. v. Electrolux Corp.*, 362 Pa. 333, 67 A. 2d 105; *Com. v. Bayuk Cigars Co.*, 345 Pa. 348, 28 A. 2d 134; *Com. v. Columbia Gas & Elec. Corp.*, 336 Pa. 209, 8 A. 2d 404. The distinction or line of demarcation between a privilege tax, an excise tax and a property tax, which in the last analysis must be determined by the incidents and the nature and legal effect of the Act rather than by the name by which it is described, is so nebulous, flexible and fluctuating, that the decisions on this point throughout the entire country are ofttimes vacillating, confused and contradictory. See: 53 C. J. S., Licenses, pp. 457-461.

from a corporation which pays a corporate loans tax to the state; and (f) has no power to tax income from real estate.

It clearly follows, if the realities of the Philadelphia tax are analyzed and carefully considered, that the City's so-called mercantile license tax is in reality and in its operation and practical effect, not a mercantile license tax, but a tax upon the income of every person and every corporation engaged in business in Philadelphia and as to said corporations is absolutely invalid.

The effect of the majority opinion will, in my judgment, open wide the door to many taxes which have heretofore been held invalid and will make meaningless and nullify many of the provisions of the Constitution. For example, if the Constitution or a statute prohibits the taxing of a particular subject, all a municipality or a legislature has to to do is to call the tax a mercantile license tax or an excise tax and then measure it by the prohibited subject. Could anything show more clearly the basic weakness of the majority opinion or the dire results which can flow therefrom?

Mr. Justice MUSMANNO joins in this Opinion.

Section 1 of the Act of August 5, 1932 Ex. Sess., P. L. 45, 53 Purdon's Pennsylvania Statutes § 4613, known as the "Sterling Act".

"Section 1. Be it enacted, &c., That from and after the effective date of this act, the council of any city of the first or second class shall have the authority by ordinance, for general revenue purposes, to levy, assess and collect, or provide for the levying, assessment and collection of, such taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of such city of the first or second class, as it shall determine, except that such council shall not have authority to levy, assess and collect, or provide for the levying, assessment

and collection of, any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee. If, subsequent to the passage of any ordinance under the authority of this act, the General Assembly shall impose a tax or license fee on any privilege, transaction, subject or occupation, or on personal property, taxed by any city of the first or second class hereunder, the act of Assembly imposing the State tax thereon shall automatically vacate the city ordinance passed under the authority of this act as to all taxes accruing subsequent to the effective date of the act imposing the State tax or license fee. It is the intention of this section to confer upon cities of the first and second classes the power to levy, assess and collect taxes upon any and all subjects of taxation which the Commonwealth has power to tax but which it does not now tax or license, subject only to the foregoing provision that any tax upon a subject which the Commonwealth may hereafter tax or license shall automatically terminate upon the effective date of the State act imposing the new tax or license fee."

Relevant Provisions of Philadelphia City Ordinance Approved by Mayor Dec. 9, 1952.

AN ORDINANCE

To provide revenue by imposing a mercantile license tax on persons engaging in certain businesses, including manufacturing, professions, occupations, trades, vocations, and commercial activities in the City of Philadelphia; providing for its levy and collection; providing for the issuance of mercantile licenses, conferring and imposing powers and duties on the Department of Collections and on the Department of Licenses and Inspections; and imposing penalties.

The Council of the City of Philadelphia hereby ordains:

SECTION 1. Definitions.

(a) "Person" means any individual, partnership, association, or corporation. Whenever used in any clause prescribing or imposing a penalty, the term "Person" as applied to associations shall mean the partners or members thereof, and as applied to corporations, the officers thereof.

• • •

(d) "Manufacturer" means any person who sells goods, wares and merchandise of his own growth, or production.

(e) "Business" means the carrying on or exercising for gain or profit within the City of Philadelphia of any trade, business, profession, vocation, or making sales to persons within the City of Philadelphia, or of any manufacturing, commercial or financial activity, service or business, including but not limited to manufacturers, brokers, wholesale dealers or wholesale vendors, retail dealers or retail vendors.

• • •

(h) "Gross Volume of Business" means gross receipts and shall include both cash and credit transactions.

• • •

SECTION 3. Imposition and Rate of Tax. Every person engaging in any of the following businesses in the City shall, in addition to paying a license fee, as herein provided, pay an annual mercantile license tax for the license year 1953 and annually thereafter at the rate set forth:

• • •

(c) (1) A manufacturer at the rate of three (3) mills on each dollar of the annual gross volume of business transacted by such person, or,

(2) In the alternative, at the option of the manufacturer at the rate of two (2) per centum of the annual gross volume of business transacted by such person less the cost of goods and less the cost of labor.

(d) (1) A manufacturer who sells also at retail at the rate of three (3) mills on each dollar of the annual gross volume of wholesale business transacted by such person and three (3) mills on each dollar of the annual volume of gross retail business transacted by such person, or,

(2) In the alternative at the option of the manufacturer who sells also at retail at the rate of two (2) per centum of the annual volume of gross wholesale business transacted by him, less the cost of goods and less the cost of labor, and at the rate of three (3) mills on each dollar of the annual volume of gross retail business transacted by such person.

(e) All other persons engaged in business at the rate of three (3) mills on each dollar of the annual gross volume of business transacted.

* * *

LIBRARY
SUPREME COURT. U. S.

FILED
JUN 26 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 990.

NATIONAL BISCUIT COMPANY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

Appeal From the Supreme Court of Pennsylvania.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

ROY J. KEEFER,
HULL, LEIBY AND METZGER,
208 Walnut Street,
Harrisburg, Pennsylvania,

LESLIE M. SWOPE,
DRINKER BIDDLE AND REATH,
1100 Philadelphia National Bank Bldg.,
Philadelphia 7, Pennsylvania,
Attorneys for Appellant.

International, 711 So. 50th St., Phila. 43, Pa.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1957.

No. 990.

NATIONAL BISCUIT COMPANY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA
Appellee.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

This Brief will be directed only to the Statement by Appellee of the Question Presented,[1] and to its first argument.[2] The other arguments of Appellee have been anticipated and answered in Appellant's Jurisdictional Statement.

1. The Statement by Appellee of the Question Presented Is Incomplete, Inaccurate, and Misleading.

Appellee's statement ignores the fundamental issue in this Appeal.[3] This issue is whether the irreconcilable, incon-

1. Motion to Dismiss or Affirm, p. 5.
2. Motion to Dismiss or Affirm, pp. 8, 9.
3. Appellant's first question; Jur. St., pp. 4; 14-15.

sistent decisions of the State court as to the nature of the State Franchise Tax, concurrently enforced, discriminate per se against United States securities owned by Appellant. Appellee's entire Motion to Dismiss or Affirm seeks to limit this court's consideration of the present appeal to the collateral issue of due process, which in turn is based by Appellee upon its inaccurate and misleading statement that the majority decision by the State court in *National Biscuit Co. v. Phila.*,[4] holding the Franchise tax to be a property tax, is mere dictum.

The majority of the State court in that case based its decision upon an unqualified ruling that the Franchise tax is a property tax. The minority dissenting opinion of Justices Bell and Musmanno in that case [5] and the minority concurring opinion of Justices Bell, Musmanno and Jones in the present case [6] expressly stated that this was not dictum, but was the very foundation of the majority decision in the Philadelphia case. The concurring minority opinion also points out that the decisions of the majority holding the State Franchise tax to be both a property tax and an excise tax are irreconcilable; and that the "property tax" decisions must be overruled if the Court is to hold that Franchise tax is an excise tax.[7] Therefore, Appellee's statement of the Question Presented is inaccurate and misleading.

The more important situation presented to this Court in the present case is the *simultaneous concurrent enforcement of irreconcilable decisions* by a majority of the State Court holding the State Franchise Tax to be *both* a *property* tax (*National Biscuit Co. v. Philadelphia*) *and* an *excise tax* (present case); and the effect of these irreconcil-

---

4. 374 Pa. 604, 98 A. 2d 182 (1953).

5. Jurisdictional Statement, Appendix D, pp. 74, 75.

6. 390 Pa. 642, 136 A. 2d 821 (1957), Jurisdictional Statement, Appendix B, pp. 46, 49.

7. Jurisdictional Statement, Appendix B., p. 49.

able decisions on the immunity of U. S. securities from state taxation.

On this phase of the case, Appellee's presentation of the Question Presented is completely silent and therefore is incomplete and inadequate. It totally ignores the question, raised from the very beginning by Appellant, that its U. S. securities are not subject to tax under the Credit Clause and the Equal Protection Clause of the U. S. Constitution and under R. S. 3701.

It is true that this question was rephrased from time to time to meet the changing positions of the state courts as they developed; but the basic question of immunity of U. S. securities was always and still is at issue.

2. The Four Questions Presented by Appellant [8] Were Properly Raised and Are Substantial.

When appellant filed its Appeal and Specification of Objections in the Dauphin County Court on April 14, 1954,[9] the decision by a majority of the State Court in *National Biscuit Co. v. Philadelphia,* holding the State Franchise tax to be a property tax,[10] was the latest pronouncement of that court as to the nature of the Franchise Tax. Appellant's pleadings in the trial court were naturally pointed to that decision. Appellant's second, third and fourth questions [11] were raised in Paragraphs 14(2) and 14(3).[12] of the Appeal and Paragraphs 14(2)(a) and (b) and 14(3)(g) thereof [13] can be construed reasonably to anticipate and raise its first question.

It would seem that Appellee's argument [14] is that Appellant's first question, to wit, that the conflicting state

8. Jurisdictional Statement, pp. 4, 5.
9. Record to the Supreme Court of Pennsylvania, p. 1a.
10. 374 Pa. 604, 98 A. 2d 182 (June 26, 1953).
11. Jurisdictional Statement, pp. 4, 5.
12. Record to the Supreme Court of Pennsylvania, pp. 7a, 8a, 9a, 10a; see, also, Jurisdictional Statement, pp. 11, 12, 13.
13. Record to the Supreme Court of Pennsylvania, pp. 8a, 10a.
14. Motion to Dismiss or Affirm, pp. 8, 9.

court decisions per se impinge on federal sovereignty, was not stated in exactly the same language in the pleadings before the trial court. This raises the serious issue whether Appellant is required to anticipate in all the nuances of its pleadings that the decisions of the state courts in the present case would not follow, but would be contrary to *National Biscuit Co. v. Philadelphia,* and furthermore would, for the first time, openly and expressly attempt to retain in force and effect conflicting theories as to the nature of the tax. It is submitted that any such requirement would be arbitrary and unreasonable. The nub of appellant's first question is that the assertion by the majority of the State Court of its power and right to hold the Franchise tax to be simultaneously and concurrently both a *property* tax and an *excise* tax, depending upon the exigencies of the particular case, constitutes *per se* a discrimination against United States securities owned by appellant. The underlying issue involved was presented at every stage of the litigation.

Appellant presented its first question, in form responsive to the developing and changing positions of the state courts, in its 3rd, 4th, 7th, 25th, 26th, 27th, 28th, 29th and 33rd Exceptions to the Opinion and Judgment Nisi of the Dauphin County Court;[15] in its "Statement Served on Lower Court under Rule 43";[16] in its Questions to the Supreme Court of Pennsylvania (See Copy of its Brief to that Court filed with this Court p. 1); and in its Petition for Reargument.[17]

Appellant submits, therefore, that the four questions presented in its Jurisdictional Statement were sufficiently raised; were considered by the State Court; and present substantial Federal questions.[18]

---

15. Record to Supreme Court of Pennsylvania, pp. 141a, 142a, 143a, 150a, 151a, 152a, 154a.
16. Record Supreme Court of Pennsylvania, pp. 158a, 159a.
17. Jurisdictional Statement, Appendix C, pp. 50-61.
18. Jurisdictional Statement, pp. 13-19.

3. Conclusion.

It is respectfully submitted that this Court has Jurisdiction of this Appeal for the reasons set forth herein and in its Jurisdictional Statement; and that the Motion to Dismiss or Affirm should be denied.

ROY J. KEEFER,
HULL, LEIBY AND METZGER,
208 Walnut Street,
Harrisburg, Pennsylvania,

LESLIE M. SWOPE,
DRINKER BIDDLE & REATH,
1100 Philadelphia National Bank Bldg.,
Philadelphia 7, Pennsylvania,
Attorneys for Appellant.

Office - Supreme Court, U.S.
FILED
JUN 7 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957
No. 980

NATIONAL BISCUIT COMPANY,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

MOTION TO DISMISS OR AFFIRM

GEORGE W. KEITEL
Deputy Attorney General
THOMAS D. McBRIDE
Attorney General
Counsel for Defendant

State Capitol
Harrisburg, Pennsylvania

SUBJECT INDEX

	Page
Motion To Dismiss or Affirm	1
Statement	2
Question Presented	5
Summary of Argument	6
Argument:	
1. The Only Federal Question Properly Raised by Appellant Is Based Upon an Alleged Reversal of the Theory as to the Nature of the Tax	8
2. There Has Been No Reversal of Theory of the Nature of the Pennsylvania Franchise Tax	10
3. Assuming That There Was a Conflict Between the State Court Decisions, the Instant Case Was Correctly Decided	12
4. No Provision of the Federal Constitution Has Been Violated by the Supreme Court of Pennsylvania in Construing the Franchise Tax as an Excise Tax	13
5. This Appeal Raises No Substantial Federal Question	15

TABLE OF CASES

Arrott's Estate, 322 Pa. 367, 185 A. 697	16
Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 37 S. Ct. 492	14
Commonwealth v. Butler County National Bank, 65 Dauph. 33	8

Commonwealth v. American Gas Co., 352 Pa. 113, 42 A. 2d 161 2

Commonwealth v. Columbia Gas & Electric Corp., 336 Pa. 209, 8 A. 2d 404 2

Commonwealth v. Eaglis Corp., 354 Pa. 493, 47 A. 2d 661 2

Comonwealth v. Ford Motor Co., 350 Pa. 236, 38 A. 2d 329, App. Dis. 324 U.S. 827 2

Commonwealth v. Koppers Co., Inc., 71 Dauph. 73 8

Commonwealth v. Monessen Amusement Co., 352 Pa. 120, 42 A. 2d 158 2, 16

Commonwealth v. Quaker Oats Co., 350 Pa. 253, 38 A. 2d 325 2

Commonwealth v. Shenango Furnace Co., 362 Pa. 481, 67 A. 2d 113 16

Commonwealth v. Stephano Brothers, 54 Dauph. 329, 49 D. & C. 617 8

Commonwealth v. Union Trust Co. of Pittsburgh, 345 Pa. 298, 27 A. 2d 151 16

Federal Drug Co. v. Pittsburgh, 358 Pa. 454, 57 A. 2d 849 10, 11

Gryger v. Burke, 344 U.S. 728, 68 S. Ct. 1256 14

Murray v. Philadelphia, 364 Pa. 157, 71 A. 2d 280 10

National Biscuit Co. v. Philadelphia, 374 Pa. 604, 98 A. 2d 182 2, 10, 11

New Jersey Realty Title Ins. Co. v. Division of Tax Appeals of New Jersey, 338 U.S. 665, 70 S. Ct. 413 15

Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454, 27 S. Ct. 556 14

Peoples Banking Co. v. Sterling, 300 U.S. 175, 57 S. Ct. 386 15

Rice Drug Co. v. City of Pittsburgh, 360 Pa. 240, 61 A. 2d 878 10

Werner Machine Co., Inc. v. Director of Division of Taxation, 350 U. S. 492, 76 S. Ct. 534 15

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 990

NATIONAL BISCUIT COMPANY,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

MOTION TO DISMISS OR AFFIRM

Appellee moves that the present appeal be dismissed or that the final judgment of the Supreme Court of Pennsylvania in the present case be affirmed on the grounds that (a) the judgment rests on adequate non-Federal bases, and (b) the Appeal does not present a substantial Federal question.

STATEMENT

In the present case, the courts below have sustained the imposition of the Pennsylvania Franchise Tax[1] upon the appellant for 1952, holding that it is an excise tax on the privilege of doing business in Pennsylvania.[2] The Pennsylvania courts had uniformly and unanimously construed the Franchise Tax as an *excise* tax in every case between the Commonwealth and its taxpayers.[3]

The appellant contended below that this unvarying line of cases had been overruled by a case between the City of Philadelphia and the appellant,[4] wherein the court had held that the city mercantile license tax imposed on appellant was not prohibited by the taxes which it paid to the Commonwealth and which were

---

[1] Act of May 16, 1935, P.L. 184, as amended, 72 P.S. §§1871, 1901; Jur. St., Appendix A, pp. 21-29.

[2] 390 Pa. 642, 136 A. 2d 821; Jur. St. App. B, p. 30.

[3] *Commonwealth v. Columbia Gas & Electric Corp.*, 336 Pa. 209 215, 8 A. 2d 404 (1939); *Commonwealth v. Ford Motor Co.*, 350 Pa. 236, 240, 38 A. 239 (1944), App. Dis. 324 U.S. 827; *Commonwealth v. Quaker Oats Co.*, 350 Pa. 253, 260, 38 A. 2d 325 (1944), App. Dis. 324 U.S. 827; *Commonwealth v. Monessen Amusement Co., Inc.*, 352 Pa. 120, 122, 42 A. 2d 158 (1945); *Commonwealth v. American Gas Co.*, 352 Pa. 113, 117, 42 A. 2d 161 (1945); *Commonwealth v. Eaglis Corp.*, 352 Pa. 493, 47 A. 2d 661 (1946); all of these cases were cited with approval in the decision of the Supreme Court of Pennsylvania, Jur. St. App. B, pp. 31-36.

[4] *National Biscuit Company v. Philadelphia*, 374 Pa. 604, 98 A. 2d 182 (1953).

described as taxes on property. In the Philadelphia case, the court was construing a State statute [5] which permitted Philadelphia to impose taxes on subjects not taxed by the Commonwealth. In deciding that the city mercantile license tax applied to the appellant, the court there was construing only the limitation in the enabling statute of the city's power to levy conflicting taxation.

The majority opinion of the court below [6] logically distinguished and reconciled its decision in the Philadelphia case with the present case. Even if the two decisions had been irreconcilible, as the minority opinion of the court below suggested,[7] the error must have been in the Philadelphia case, because the minority opinion joined with the majority opinion in upholding the Franchise Tax as an excise tax.

The appellant here should not be permitted to relitigate its liability under the Philadelphia mercantile license tax in the present franchise tax litigation with the Commonwealth of Pennsylvania. There can be no substantial question of due process because of any alleged conflict between the decisions in the Philadelphia case and in the instant case.

If the Franchise Tax had been held to be a property tax, the ultimate question in the present appeal would have been whether the Constitution of the United States required the Commonwealth's taxing officers to exclude from the measure of the appellant's Fran-

---

[5] Act of August 5, 1932, P.L. (Ex. Sess.) 45, 53 P.S. §4613, known as the Sterling Act, Jur. St. p. 75.

[6] Jur. St. pp. 36-42.

[7] Jur. St. p. 46.

chise Tax its United States securities and other intangibles located outside of Pennsylvania. Under the well-established decisions of this Court, the answer to this question is now clearly negative, since the State tax has been determined to be an excise tax for the privilege of doing business.

QUESTION PRESENTED

Is the due process clause of the Constitution of the United States violated when, after an unbroken line of cases like the present case between the Commonwealth of Pennsylvania and its corporation taxpayers had held that the State franchise tax is an *excise* tax, the court below refused to follow the dictum in a case between the appellant and the City of Philadelphia that the State taxes paid by appellant were taxes on "property", which did not preclude the City from imposing a mercantile license tax upon the appellant?

SUMMARY OF ARGUMENT

The only Federal constitutional question properly raised by the appellant [8] is that the decision of the courts below in the present case resulted in subjecting appellant to "simultaneous double taxation" which is "arbitrary and unreasonable" and a denial of a "fair trial in the courts, and a reasonable adjudication" of appellant's rights by reason of the "reversal of theory as to the nature" of the State tax involved.

This does not present a substantial Federal question.

The double taxation referred to is the Philadelphia mercantile license tax and the State Franchise Tax. The Philadelphia tax is imposed under a State statute [9] which authorizes the city to levy a tax on any privilege, transaction, subject, occupation or personal property which is not "subject to a State tax or license fee". In construing the enabling act, the court was determining the power of the municipality to tax. Such a construction of the local ordinance and the statute under which it is adopted did not affect the rights of the Commonwealth, which was not even a party to the proceedings. Unquestionably, Philadelphia could have imposed the mercantile license tax even though it was double taxation, if the enabling

[8] See Footnote 10, infra.

[9] Act of August 5, 1932, P.L. (Ex. Sess.) 45, 53 P.S. §4613, known as the Sterling Act. Jur. St. p. 75.

statute had been silent about possible conflicts with State taxes. In construing the express limitation on the city's power to tax, the court was not determining the relationship between State taxpayers and the Commonwealth.

It is difficult to imagine how the appellant was denied a fair trial or a reasonable adjudication of its right in the present case. The only basis pleaded for such a conclusion is the reversal of theory as to the nature of the Franchise Tax. However, there was no such reversal of theory. Even if there had been, the reaffirmance in the instant case of the well established rule that the Franchise Tax is an excise tax would not have been a denial of due process as to the appellant.

Thus, there can be no subsance to the Federal questions which the appellant seeks to raise in the present appeal.

ARGUMENT

1. The Only Federal Question Properly Raised by Appellant Is Based Upon an Alleged Reversal of the Theory as to the Nature of the Tax

The questions raised by the appellant in the present case are necessarily limited to those raised in the Specification of Objections set forth in the Appeal from the Board of Finance and Revenue to the Court of Common Pleas of Dauphin County.[10]

In paragraph 14 of the Specification of Objections,[11] the appellant first points out that the franchise tax settlement is contrary to the decision in the Philadelphia case. Sub-paragraph 2 assumes the tax to be a

[10] Section 1104 of The Fiscal Code, Act of April 9, 1929, P.L. 343, as amended, 72 P.S. §1104 (Jur. St. p. 2), authorizes appeals from the decision of the taxing officers of the Commonwealth to the Court of Common Pleas of Dauphin County. After providing that every appeal shall be accompanied by a "specification of objection" that section further provides: "• • • and no questions shall be raised which are not included in the specification of objections filed as hereinbefore provided". A corporation on appeal is not entitled to have a question determined which has not been included in the specification of objections: *Commonwealth v. Stephano Brothers*, 54 Dauph. 329, 49 D. & C. 617 (1944); *Commonwealth v. Butler County National Bank*, 65 Dauph. 33 (1954); *Commonwealth v. Koppers Co., Inc.*, 71 Dauph. 73 (1957).

[11] Record before Supreme Court of Pennsylvania, pp. 7a, 8a.

property tax, and alleges both State and Federal Constitutional grounds for the invalidity of the settlement. Since the Pennsylvania Courts have ruled in the present case that the Franchise Tax is an excise tax, sub-paragraph 2 is clearly inapplicable.

In sub-paragraph 3 [12] the appellant specifies the objections which apply if "the so-called 'Franchise Tax' settlement made against the apppellant for the year 1952 should be upheld by the Courts of the Commonwealth of Pennsylvania". Under this Specification of Objection, the appellant is again referring to the inconsistent decision in the Philadelphia case, and objects that the settlement "would subject appellant to simultaneous double taxation under two mutually exclusive taxing statutes, and would be arbitrary and unreasonable". Appellant then avers that if the decision in the Philadelphia case is not followed in this proceeding, "representing another reversal of theory as to the nature of the tax, appellant * * * will have been denied a fair trial in the courts, and a reasonable adjudication of its rights" in violation of the State and Federal Constitutions.

A fair reading of paragraph 14 (3) of the Specification of Objections indicates that the only Federal constitutional questions properly pleaded and presently pertinent are (a) simultaneous double taxation, and (b) denial of a fair trial because of a reversal of theory as to the nature of the tax. Neither of these grounds are substantial.

---

[12] Record before Supreme Court of Pennsylvania, pp. 8a, 9a, 10a.

2. There Has Been No Reversal of Theory of the Nature of the Pennsylvania Franchise Tax

The majority opinion[13] of the Supreme Court of Pennsylvania in the present case, plainly and properly distinguished its prior decision in the Philadelphia case.[14] There the court was construing a State statute, known as the Sterling Act,[15] which authorized the city to levy taxes which did not conflict with or duplicate State taxes. The sole question in that case was whether the Philadelphia tax conflicted with the State taxes being paid by the same taxpayer. The court held that it did not so conflict.

In construing the Sterling Act, the Supreme Court of Pennsylvania had pointed out on several occasions that, in determining whether or not the local tax conflicted with a State tax, it was immaterial whether the tax be regarded as an excise or a property tax.[16]

---

[13] Jur. St. pp. 36-42.

[14] *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 98 A. 2d 182 (1953).

[15] Act of August 5, 1932, P.L. (Ex. Sess.) 45, 53 P.S. §4613, known as the Sterling Act, Jur. St. p. 75.

[16] In *Murray v. Philadelphia*, 364 Pa. 157, 169, 71 A. 2d 280 (1950), which arose under the Sterling Act, the court said "* * * in construing the Act, it is immaterial that state taxes have been referred to as excise or franchise taxes or by any other adjective; the reality controls". To the same effect see *Rice Drug Co. v. City of Pittsburgh*, 360 Pa. 240, 242, 61 A. 2d 878 (1948), which upheld the validity of a mercantile license tax ordinance as to a dealer in cigarettes which had secured a state cigarette permit and paid the state cigarette tax. In *Federal Drug Co. v. Pittsburgh*, 358 Pa. 454, 457, 57 A. 2d 849 (1948), the court held that the city was not precluded from levying a mercantile license tax by the

This had been the law of Pennsylvania when the Philadelphia case arose. The dictum of the opinion writer in that case regarding the nature of the State taxes was entirely unnecessary to the result obtained, because, based on precedent there could have been no conflict between the Philadelphia mercantile license tax and the State Franchise Tax.

All of the cases arising between the Commonwealth of Pennsylvania and ifs taxpayers have consistently construed the Franchise Tax as an excise tax.[17] The Supreme Court of Pennsylvania in the instant case was merely following the well established law of Pennsylvania.

Since there is no irreconcilible conflict between the State Court decisions construing the Sterling Act and the Franchise Tax, there could have been no reversal in the theory of the nature of the Franchise Tax.

---

existence of the state franchise tax, even though both taxes were privilege taxes; see quotation in opinion of the court below (Jur. St. App. B, pp. 38, 39), as follows: "The reasoning and principles established in upholding the Pittsburgh mercantile tax in the *Federal Drug Co.* case were equally applicable and decisive of the validity of the Philadelphia mercantile tax. It was therefore unnecessary in the *National Biscuit Co.* case to refer to the State franchise tax as a property tax or to treat it as such."

[17] See cases cited supra, Footnote 3.

3. Assuming That There Was a Conflict Between the State Court Decisions, the Instant Case Was Correctly Decided

The appellant here [18] complains that, because of two conflicting decisions of the Supreme Court of Pennsylvania, it is required to pay both the State Franchise Tax and the Philadelphia mercantile license tax. The alleged conflict between the two taxes constitutes the sole basis for the present appeal to this Court.

The majority opinion of the court below [19] reconciled the allegedly conflicting decisions in a logical and reasonable manner.

It is true that the minority opinion of the court below [20] recognized such a conflict. However, it should be quickly noted that even the minority opinion would have overruled its earlier decision in the Philadelphia case when it affirmed the franchise tax settlement.

Therefore, even under the construction of the minority opinion, there has been no mistake in the instant case; the only mistake was in failing to overrule the Philadelphia decision.

This does not give the appellant any basis for jurisdiction of this Court on appeal.

If appellant desires to persist in its contention that the Philadelphia decision was incorrect, it should di-

---

[18] See Jur. St. p. 19.
[19] Jur. St. pp. 36-40.
[20] Jur. St. p. 46.

rect its litigation toward the city tax ordinance, and not attempt to have the question of its liability for the Philadelphia tax determined by this Court in the instant case.

---

4. No Provision of the Federal Constitution Has Been Violated by the Supreme Court of Pennsylvania in Construing the Franchise Tax as an Excise Tax

As noted above,[21] the Supreme Court of Pennsylvania, in cases between the Commonwealth and its taxpayers, has never deviated from its position that the corporations which pay the Pennsylvania Franchise Tax are paying an excise tax for the privilege of doing business in Pennsylvania. This position has been held not only with respect to the appellant, but as to all other taxpayers since the enactment of the Franchise Tax in 1935.

Therefore, we do not have here a case where the State Court has changed a pre-existing interpretation of a tax statute as between the taxpayer and the taxing authority. Even in such cases, this Court has indicated that there would be no lack of due process, and therefore no basis for a Federal question.

A multitude of cases could be cited to show that the 14th Amendment to the Constitution of the United States does not impair the authority of the states to determine finally, according to their settled usage and established modes of procedure, issues which do not involve any right secured by the Constitution of the United States or an Act of Congress, or a treaty.

---

[21] See cases cited supra, Footnote 3.

Although there appear to be no decisions exactly like the present case, the following excerpts from opinions of this Court should be sufficient to demonstrate the unavailability of the 14th Amendment for the purpose urged by the appellant in the present case:

> "* * * if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights. * * *"[22]

> "* * * We cannot treat a mere error of state law, if one occurred, as a denial of due process; * * *"[23]

> "* * * There is no constitutional right to have all general propositions of law once adopted remain unchanged. * * * in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, *is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed.*"[24]

> "* * * The new meaning, if there is any, is not ascribed to the Constitution because a later statute has said it must be done. The new meaning is the product of the independent judgment of a court. So the state court has told us, and the good faith of its declaration is not successfully impeached. * * * To changes thus wrought the

---

[22] *Chicago Life Insurance Co. v. Cherry*, 244 U.S. 25, 30, 37 S. Ct. 492 (1917).

[23] *Gryger v. Burke*, 334 U.S 728, 731, 68 S. Ct. 1256 (1948).

[24] *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 461, 27 S. Ct. 556 (1908).

Constitution of the United States does not offer an impediment." [25]

Even though it be assumed that the decision in the instant case were in conflict with the Philadelphia case, nevertheless, the decision in the present case would not be a denial of due process.

5. This Appeal Raises No Substantial Federal Question

It can no longer be questioned that a State excise tax levied upon a corporation for the privilege of doing business within the State may be measured by the apportioned value of its capital stock, including all of its securities, governmental or otherwise.[26]

Appellant relies [27] upon the decision of this Court in *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals of New Jersey*,[28] wherein a local tax assessment in New Jersey was held to be invalid because it was a tax upon United States securities. However, appellant entirely overlooked the subsequent decision of this Court in *Werner Machine Co., Inc. v. Director of Division of Taxation*,[29] wherein the New Jersey corporate franchise tax was upheld despite the inclusion of Federal bonds in the determination of the net worth of the corporation.

---

[25] *Peoples Banking Co. v. Sterling*, 300 U.S. 175, 182, 57 S. Ct. 386 (1937).

[26] See decisions of this Court cited by the Supreme Court of Pennsylvania, Jur. St. p. 43.

[27] Jur. St. pp. 3, 15.

[28] 338 U.S. 665, 70 S. Ct. 413 (1949).

[29] 350 U.S. 492, 79 S. Ct. 534 (1956), aff'g. 17 N.J. 121, 110 A. 2d 89.

Moreover, in contending that the State Franchise Tax and the Capital Stock Tax are equivalent, appellant is relying upon two decisions of the Pennsylvania Supreme Court[30] which apply to other unrelated taxes, and the effect of which as precedents has been completely nullified by later decisions of that court construing both the Franchise and the Capital Stock Tax Acts.[31]

It has been firmly established historically and by a uniform line of decisions that the Pennsylvania Franchise Tax is an excise tax on the privilege of doing business in Pennsylvania. Consequently, there is no basis for the appellant's contention that this is a property tax which infringes upon any of its constitutional rights.

Accordingly, the appeal in the present case should be dismissed, or the decision of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

THOMAS D. MCBRIDE
Attorney General

GEORGE W. KEITEL
Deputy Attorney General
Counsel for Defendant.

---

[30] *Arrott's Estate*, 322 Pa. 367, 185 A. 697 (1936); *Commonwealth v. Union Trust Co. of Pittsburgh*, 345 Pa. 298, 27 A. 2d 151 (1942); Jur. St. pp. 8, 15, 17.

[31] *Commonwealth v. Monessen Amusement Co.*, 352 Pa. 120, 42 A. 2d 158 (1945); *Commonwealth v. Shenango Furnace Co.*, 362 Pa. 491, 67 A. 2d 113 (1949), discussed in detail by the court below, Jur. St. pp. 40, 41, 42.